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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether plaintiffs seeking relief from discriminatory state taxation under 49 U.S.C. § 11503 must prove purposeful overvaluation of their property by state officials with discriminatory intent where:

a. The language of 49 U.S.C. § 11503 does not require any showing of intentional discrimination by state officials; and

b. A requirement to prove intentional discrimination will, as a practical matter, permit states to negate Congress' purposes in enacting 49 U.S.C. § 11503.

LIST OF PARTIES TO THIS PROCEEDING

Petitioners (hereinafter referred to as the "railroads") are listed in the caption. The parents, subsidiaries (other than wholly owned subsidiaries) and affiliates of these railroads are numerous and are listed in Appendix I. All respondents (other than certain county-intervenors) are listed in the caption. The county-intervenors are the following counties of the State of Kansas: Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THIS PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
a. The Purpose of Section 306.	3
b. Relevant Provisions of Section 306.	5
c. Prior Section 306 Litigation in Kansas.	7
d. Nature of the Present Litigation.	9
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	18
APPENDIX	1a-46a

TABLE OF AUTHORITIES

CASES: Page

Alabama Great Southern R.R. Co. v. *Eagerton*, 663 F.2d 1036 (11th Cir. 1981), *on remand*, 541 F.Supp. 1084 (M.D. Ala. 1982) 15

Atchison, Topeka & Santa Fe Ry. Co. v. *Lennen*, 640 F.2d 255 (10th Cir.), *on remand*, 531 F.Supp. 220 (D. Kan. 1981) 2, 14

Atchison, Topeka & Santa Fe Ry. Co. v. *Lennen*, 552 F.Supp. 1031 (D. Kan. 1982) 8, 14

Atchison, Topeka & Santa Fe Ry. Co. v. *Lennen*, No. 81-1495 (D. Kan.) 8

Atchison, Topeka & Santa Fe Ry. Co. v. *The State of Arizona*, 559 F.Supp. 1237 (D. Ariz. 1983) 14

Burlington Northern, Inc. v. *The Dept. of Revenue of the State of Montana*, CV-80-139-BLG (D. Mont., filed 7/26/82) 15

Burlington Northern R.R. Co. v. *Lennen*, Case Nos. 82-1562, 82-1561 (D. Kan., filed 12/1/82) 15

Burlington Northern R.R. Co. v. *Bair*, Civil No. 83-100-A (D. Ia., filed 4/4/83) 15

Clinchfield Railroad Co. v. *Lynch*, 700 F.2d 126 (4th Cir. 1983), *affirming*, 527 F.Supp. 784 (E.D.N.C. 1981) 14

General American Transportation Corp. v. *Louisiana Tax Commission*, 680 F.2d 400 (5th Cir. 1982), *affirming*, 511 F.Supp. 610 (M.D. La. 1981) 14

Griggs v. *Duke Power Company*, 401 U.S. 424 (1971) . 17

Land v. *Dollar*, 330 U.S. 731 (1947) 18

Larson v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1948) 18

Louisville & Nashville R.R. Co. v. *Dept. of Revenue of the State of Florida*, Case No. 81-771 (N.D. Fla., filed 6/28/83) 14

Louisville & Nashville R.R. Co. v. *Louisiana Tax Commission*, 498 F.Supp. 418 (M.D. La. 1980) 14

Ogilvie v. *State Board of Equalization of the State of North Dakota*, 492 F.Supp. 446 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.) *cert denied*, 454 U.S. 1086 (1981) 14, 15

Table of Authorities Continued

Page

Southern Railway Co. v. *State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983) 4, 14, 15

State of Tennessee v. *Louisville & Nashville R.R. Co.*, 478 F.Supp. 199 (M.D. Tenn. 1979), *aff'd w/o opinion*, 652 F.2d 59 (6th Cir. 1981), *cert denied*, 454 U.S. 834 (1981) 14

State of Arizona v. *Atchison, Topeka & Santa Fe Ry. Co.*, 656 F.2d 398 (9th Cir. 1981) 14

Trailer Train Co. v. *State Board of Equalization of the State of California*, 511 F.Supp. 553 (N.D. Cal. 1981), *aff'd in part*, 697 F.2d 860 (9th Cir. 1983) . 14

Trailer Train Co. v. *The State Board of Equalization of the State of North Dakota*, 710 F.2d 468 (8th Cir. 1983) 14

Statutory Provisions Cited

Federal

28 U.S.C. § 1292(a)(1) 18

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1341 ..... 5, 7

49 U.S.C. § 11503 recodification of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ..... *passim*

State

Kansas Statutes Annotated (K.S.A.) § 79-501 8

K.S.A. § 79-503 8

Legislative History Cited

S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976) .. 3, 4, 13

H. Rep. No. 94-725, 94th Cong., 1st Sess. (1975) 4

H. Rep. No. 93-1381, 93rd Cong., 2d Sess. (1972) 13

S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969) 4, 13

S. Rep. No. 1483, 90th Cong., 2d Sess. (1968) 13

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (reprinted in Appendix A) is reported at 715 F.2d 494. The opinion of the United States District Court for the District of Kansas, dated December 9, 1982 (reprinted in Appendix B) is unreported. The district

court's order, dated December 1, 1982, (reprinted in Appendix C) is also unreported.

JURISDICTION

The judgment of the Tenth Circuit which is sought to be reviewed (reprinted in Appendix A) is dated August 25, 1983. The order of the Tenth Circuit denying the railroads' timely petition for rehearing and suggestion for rehearing in banc (reprinted in Appendix D) is dated September 28, 1983. The order of the Tenth Circuit staying its mandate until November 14, 1983 (reprinted in Appendix E), is dated October 13, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976), now codified at 49 U.S.C. § 11503.

The language of 49 U.S.C. § 11503 as codified differs from the language of Section 306. However, the codification cannot be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978).

In a previous decision under 49 U.S.C. § 11503, *Atchison, Topeka & Santa Fe R.R.* v. *Lennen*, 640 F.2d 255, 258 (10th Cir. 1981), the Tenth Circuit held that the language of Section 306 governs issues of statutory construction. In deciding this case, the Tenth Circuit utilized the language of Section 306, rather than 49 U.S.C. § 11503. *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 496 n. 1 (10th Cir. 1983) (Appendix A, p. 2a).

In accordance with the practice of the Tenth Circuit, the railroads will refer in this petition to the language of Section 306. Its provisions are reprinted in Appendix F; the provisions of 49 U.S.C. § 11503 are reprinted in Appendix G.

STATEMENT OF THE CASE

Section 306 prohibits discriminatory state taxation of rail transportation property without regard to the intent of state officials. Discrimination under the Act may arise from the overvaluation of rail transportation property, from the underassessment of other commercial and industrial property, or from a combination of both factors.

In this case, the Tenth Circuit has held that, notwithstanding the absence of any statutory requirement to show discriminatory intent, plaintiffs in Section 306 cases must demonstrate such intent on the part of state officials in order to obtain relief from discriminatory overvaluation of their property. If allowed to stand, the Tenth Circuit's decision will permit states to substitute one form of tax discrimination for another and will frustrate Congress' purpose in enacting Section 306.

a. The Purpose Of Section 306.

The purpose of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") was "to promote the revitilization of the railroad industry in the United States."[1] Congress found that railroads were in poor financial condition, that they had insufficient funds to maintain and upgrade their facilities, and that this greatly diminished the railroads' ability to provide necessary

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[1] S. Rep. No. 94-499, 94th Cong., 2d Sess. p. 1 (1976), reprinted in 1976 *U.S. Code Cong. & Ad. News*, p. 14.

services to the public and adversely affected the nation's economy.[2] The 4-R Act was intended to eliminate many of the regulatory and financial burdens imposed on the railroad industry.[3]

Discriminatory state taxation of railroad property was one of Congress' principal concerns. As reported by one congressional committee:

> [R]ailroads are over-taxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property . . . taxation should be ended.[4]

Congressional committees also noted that railroads are easy prey for state and local tax assessors, since they are "nonvoting, often nonresident, . . . and cannot easily remove their right of way and terminals."[5] After extensive investigation, Congress concluded that the national interest required the prohibition of discriminatory state taxation of railroads. Congress also concluded that, in order to efficiently and effectively enforce this prohibition, federal courts should be given jurisdiction to prevent state tax discrimination against railroad property.[6] Thus, Section 306, which is the culmination of fifteen

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[2] *Ibid*, p. 2-3.

[3] *Ibid*, p. 4.

[4] H.R. Rep. No. 94-725, 94th Cong., 1st Sess. p. 78 (1975).

[5] S. Rep. No. 91-630, 91st Cong., 1st Sess. p. 3 (1969).

[6] *See Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522, 529 (11th Cir. 1983).

years of Congressional consideration,[7] prohibits states from assessing discriminatory taxes against railroad property and creates a specific exception to the Tax Injunction Act.[8]

b. Relevant Provisions Of Section 306.

Section 306(1) prohibits four acts which, in the language of the statute, "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce."[9] This litigation arises under Section 306(1)(a), which states:

> It is unlawful for a State, a political subdivision of a State, or a government entity or person acting on behalf of such State of subdivision to commit . . .
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same

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[7] *See* S. Rep. No. 87-445, 87th Cong., 1st Sess. (1961); H.R. 7421, 87th Cong., 1st Sess. (1961); H.R. 7497, 87th Cong., 1st Sess. (1961); H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong., 2d Sess. (1966); H.R. 1480, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92nd Cong., 1st Sess. (1971); S. 3945, 92nd Cong., 2d Sess. (1972); S. Rep. No. 92-1085, 92nd Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973).

[8] 28 U.S.C. § 1341.

[9] See Appendix F, §§ 306(1)(a), (b)(c) & (d).

assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"Assessment" is defined by the Act as "valuation for purposes of a property tax levied by any taxing district."[10] "Transportation property" is defined as property which is "owned or used by a common carrier by railroad subject to [the Interstate Commerce Act]."[11] "Commercial and industrial property" is defined as "all property, real or personal, other than transportation property and land used for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy."[12]

In essence, Section 306(1)(a) establishes a simple equation to which states must adhere in taxing rail transportation property:

Assessed Value of Rail Transportation Property		Assessed Value of All Other Commercial and Industrial Property
True Market Value of Rail Transportation Property	Must Not Exceed	True Market Value of All Other Commercial and Industrial Property.

[10] See Appendix F, § 306(3)(a).

[11] See Appendix F, § 306(3)(d).

[12] See Appendix F, § 306(3)(c).

Under this statutory formula, discrimination exists whenever a railroad's assessed value relative to its true market value exceeds the assessed value of commercial and industrial property relative to its true market value. "True market value" is the standard to which assessments of both rail transportation property and commercial and industrial property must be compared. Without calculating the ratio on the left-hand side of the Section 306 equation (which clearly necessitates a determination of the true market value of rail transportation property), one obviously cannot make the comparison of assessment ratios which the statute requires.

Section 306(2) confers jurisdiction upon district courts of the United States, notwithstanding 28 U.S.C. § 1341 and without regard to amount in controversy or citizenship of the parties, to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of [Section 306]." No conditions are imposed upon the exercise of such jurisdiction, except that the ratio of assessed value to true market value of transportation property must exceed the ratio applicable to commercial and industrial property by at least 5 per cent.[13]

c. Prior Section 306 Litigation In Kansas.

In 1980, five separate Section 306 cases were filed in the United States District Court for the District of Kansas by eleven Kansas railroads, six of which are petitioners in this case. In all five cases, the railroads sought preliminary and permanent injunctive relief prohibiting Kansas officials from collecting ad valorem taxes upon the

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[13] See Appendix F, § 306(2)(c).

railroads' property in violation of Section 306 for the 1980 tax year.

In each of these cases, the railroads did not challenge the values that Kansas officials had assigned to their property for ad valorem tax purposes. The left-hand side of the Section 306 equation was essentially stipulated by the parties and the proof focused primarily upon the right-hand side of the equation. In each of these cases, the railroads alleged that their property had been assessed at a ratio of assessed value to true market value of 30%[14] while locally-assessed commercial and industrial property had been assessed at approximately 12%.

On April 15, 1982, the district court issued its decision permanently enjoining Kansas officials from levying or collecting ad valorem taxes on rail transportation property for the 1980 tax year at a ratio of assessed value to true market value greater than 12.4% (the average ratio at which locally-assessed commercial and industrial property had been assessed in Kansas for the 1980 tax year). *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, 552 F. Supp. 1031 (D. Kan. 1982). This resulted in a reduction of railroad taxes for 1980 of 58%. On July 21, 1982, Kansas appealed the *Lennen* decision to the Tenth Circuit. That appeal is now pending.

Before the district court issued its final order in the 1980 case, the railroads filed similar cases for the 1981 tax year.[15] By agreement, these cases were stayed pending the resolution of the appeal in the 1980 case. The values which the state had assigned to the railroads' property for

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[14] Under Kansas law, all real property subject to ad valorem taxation is required to be valued at its fair market value in money. K.S.A. § 79-501. Kansas law further requires that all property subject to general property taxation be appraised uniformly and equally and assessed at 30% of fair market value. K.S.A. § 79-503.

[15] *See Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, No. 81-1495.

the 1981 tax year were not significantly higher than the 1980 values. Therefore, in their 1981 cases, the railroads complained only of the underassessment of commercial and industrial property.

d. Nature Of The Present Litigation.

Following the 1980 and 1981 cases (in which the railroads obtained substantial equalization relief), Kansas officials substantially increased their estimate of the 1982 true market values of each of the petitioning railroads as follows:

Railroad	1981 System Valuation	1982 System Valuation	Percentage Increase
Burlington Northern Railroad Company	1,750,000,000	2,300,000,000	31.4%
Missouri Pacific Railroad Company	1,275,000,000	1,550,000,000	21.56%
The Kansas City Southern Railway Company	130,000,000	175,000,000	34.6%
Union Pacific Railroad Company	1,750,000,000	2,300,000,000	31.4%
Missouri-Kansas-Texas Railroad Company	100,000,000	160,000,000	60.0%

Statistical evidence also showed that commercial and industrial property in Kansas had been assessed for the 1982 tax year at a ratio of assessed value to the market value of only 11.7%.

On July 9, 1982, the railroads filed this action in the United States District Court for the District of Kansas alleging a violation of Section 306(1)(a) and seeking a preliminary and permanent injunction against the levy or collection by respondents of the excessive portion of the

first-half of the railroads' 1982 ad valorem taxes. Jurisdiction of the district court was predicated upon Section 306(2). The railroads' complaint alleged that the respondents had: (1) valued railroad property for purposes of ad valorem taxation in excess of true market value, and (2) had failed to equalize the railroads' assessments with those of locally-assessed commercial and industrial property.

At the hearing on the preliminary injunction, the railroads introduced evidence which showed:

a. Locally-assessed commercial and industrial property in Kansas was assessed at a median ratio of only 11.7% of true market value, rather than 30%;

b. In valuing the railroads' property for the 1982 tax year, the defendants had increased the railroads' valuations from the 1981 tax year by amounts ranging from 21.56% (in the case of Missouri Pacific Railroad Company) to 60% (in the case of Missouri-Kansas-Texas Railroad Company);

c. By the admission of the state's own appraisers, the increases in the railroads' values from 1981 to 1982 were not justified by any corresponding increases in the indicators of value used for railroad appraisal purposes;

d. The values which the state's appraisers assigned to the railroads' property for the 1982 tax year exceeded true market value by amounts ranging from 10% (in the case of the Missouri-Kansas-Texas Railroad Company) to 90.8% (in the case of the Union Pacific Railroad Company); and

e. As a result of the overvaluation of the railroads' property, the ratios of assessed value to true market value of rail transportation property in Kansas for the 1982 tax year ranged from 33% (in the case of the Missouri-Kansas-Texas Railroad Company) to 57.02% (in the case of the Union Pacific Railroad Company), higher in each case than the median ratio of 11.7% for commercial and industrial property.

By order dated December 1, 1982, the district court granted a preliminary injunction enjoining the assessment of railroad property at a ratio higher than 11.7%, and permitted the railroads to pay only 39% of their 1982 first-half taxes pending final disposition of the case. (Appendix C, p. 32a). However, the district court declined to grant the railroads preliminary injunctive relief on their claims of discrimination resulting from overvaluation of their property, holding that it had no jurisdiction to hear issues of railroad valuation, except where it appeared that a state had artificially raised valuations in order to retaliate against railroads who had previously obtained equalization relief under Section 306. (Appendix B, p. 24a). The district court supplemented its order of December 1, 1982, with an opinion dated December 9, 1982. (Appendix B).

On December 8, 1982, the railroads appealed the district court's refusal to grant a preliminary injunction on their claims of discrimination resulting from overvaluation of their property. On December 17, 1982, the railroads obtained from the Tenth Circuit a temporary injunction prohibiting the collection of the railroads' 1982 first-half taxes based upon excessive values.[16]

Before the Tenth Circuit, the railroads argued that: (1) the plain language of Section 306(1)(a) *requires* federal courts to determine the true market value of railroad property in order to compare the ratio of assessed value to true market value of railroad property with other property and to decide whether a violation of Section 306(1)(a) has occurred; and (2) the district court's refusal to hear railroad valuation issues, except in cases of "reliation," permits state officials to overvalue railroad proper-

[16] Appendix H p. 42a.

ty with impunity and to circumvent the provisions of Section 306(1)(a).

The Tenth Circuit rejected the district court's conclusion that Section 306(1)(d) requires a showing of "retaliation" as a prerequisite to hearing valuation issues. However, the Tenth Circuit held that federal courts have jurisdiction to determine valuation issues under Section 306 only where a railroad can make "a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation." (Appendix A, p. 6a). Although the Tenth Circuit acknowledged that discriminatory assessments can result from overvaluation of railroad property as well as from underassessment of other property,[17] the court ruled that Section 306 was not intended to prohibit all forms of *de facto* property tax discrimination against rail transportation property and that Congress, in enacting Section 306, was concerned primarily with equalization-not valuation. (Appendix A, p. 4a).

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[17] An "assessment" is the product of a valuation and an assessment percentage. A discriminatory assessment can be achieved by overvaluing rail transportation property, as well as by undervaluing other commercial and industrial property. For example, if the results of a sales assessment ratio study established that the median assessment ratio for locally-assessed commercial and industrial property in a state was no greater than 60/100 or 60%, Section 306 would prohibit the assessment of rail transportation property at more than 60% of its true market value. If the true market value of a particular railroad was $100,000, the maximum permissible assessment under Section 306(1)(a) would be $60,000. If the state attempted to assess that railroad at $80,000, it would plainly be in violation of Section 306(1)(a). However, a state could achieve the same discriminatory result (i.e., an assessment of $80,000) by "valuing" the railroad at $135,000 and assessing it at 60% (i.e., .60 x $135,00 = $81,000).

The Tenth Circuit stayed its mandate and kept its injunction in force pending the filing of this petition for certiorari by the railroads. (Appendix E, p. 36a).

REASONS FOR GRANTING THE WRIT

This Case Is Of Overriding Importance. The Tenth Circuit's Decision Is An Open Invitation To The States To Discriminate Against Rail Transportation Property And To Negate Congress' Objectives In Enacting Section 306 By The Simple Expedient Of Valuing Rail Transportation Property In Excess Of True Market Value.

Congress obviously considered discriminatory state taxation of rail transportation property to be a problem of national concern. As shown by the legislative history of Section 306, Congress determined that state tax discrimination against rail transportation property was pervasive and imposed unacceptable burdens on interstate commerce.[18] Congress concluded that, in order to strengthen and facilitate interstate commerce, it must prohibit state tax discrimination against rail transportation property and provide a federal forum for the efficient and impartial litigation of tax discrimination claims.[19] Section 306 is, therefore, important remedial legislation.

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[18] *See* Report by the Committee on Interstate and Foreign Commerce Together with Additional and Minority Views, H. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974); Discriminatory State Taxation of Interstate Carriers, Report of the Senate Committee on Commerce, S. Rep. No. 92-1085, 92nd Cong., 2d Sess. (1972); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 1483, 90th Cong., 2d Sess. (1968).

[19] *Ibid;* S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976).

Since the effective date of Section 306, approximately thirty cases have been maintained in various federal courts challenging discriminatory assessments of rail transportation property.[20] Virtually all of these cases involve state tax discrimination resulting from the underassessment of commercial and industrial property. Almost without exception, the courts which have heard these cases have given effect to the remedial purposes of Section 306. Courts of appeal—other than the Tenth Circuit—have held expressly that Section 306 was in-

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[20] *Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983); *Clinchfield Railroad Co.* v. *Lynch*, 700 F.2d 126 (4th Cir. 1984), *affirming*, 527 F. Supp. 784 (E.D. N.C. 1981); *Trailer Train Co.* v. *State Board of Equalization of the State of California*, 697 F.2d 860 (9th Cir. 1983), *affirming in part*, 511 F. Supp. 553 (N.D. Cal. 1981); *Trailer Train Co.* v. *The State Board of Equalization of North Dakota*, 710 F.2d 468 (8th Cir. 1983); *General American Transportation Corp.* v. *Louisiana Tax Commission*, 680 F.2d 400 (5th Cir. 1982), *affirming*, 511 F. Supp. 610 (M.D. La. 1981); *State of Tennessee* v. *Louisville & Nashville R.R. Co.*, 478 F. Supp. 199 (M.D. Tenn. 1979), *aff'd without opinion*, 652 F.2d 59 (6th Cir. 1981), *cert. denied*, 454 U.S. 834 (1981); *Ogilvie* v. *State Board of Equalization of the State of North Dakota*, 492 F. Supp. 446 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981); *State of Arizona* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 656 F.2d 398 (9th Cir. 1981); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen*, 640 F.2d 255 (10th Cir.), *on remand*, 531 F. Supp. 220 (D. Kan. 1981); *Atchison, Topeka and Santa Fe Ry. Co.* v. *The State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen*, 552 F. Supp. 1031 (D. Kan. 1982); *Louisville & Nashville R.R. Co.* v. *Louisiana Tax Commission*, 498 F. Supp. 418 (M.D. La. 1980); *Louisville & Nashville R.R. Co.* v. *Dept. of Revenue of the State of Florida*, Case No. 81-771 (N.D. Fla., filed 6/28/83) (Order Granting Plaintiffs' Motion for Summary Judgment); *Burlington Northern R.R. Co.* v. *Bair*, Civil No. 83-100-A (D. Iowa, filed 4/4/83) (Memorandum Opinion and Order Supplementing 3/30/83 oral preliminary injunction); *Burlington Northern R.R. Co.*

tended by Congress to prohibit discrimination against rail transportation property in all of its guises.[n]

As a direct result of Section 306, railroads have successfully challenged discriminatory taxes in Alabama, Arkansas, Arizona, California, Florida, Indiana, North Carolina, North Dakota, Montana, Kansas, and Tennessee. Federal preliminary injunctions have issued under Section 306 against discriminatory taxation in Colorado, Georgia, Iowa, Oklahoma, Utah, West Virginia, and Wyoming. Such relief has been obtained and maintained in large part because of the perception by the federal courts that, in enacting Section 306, Congress intended to prevent the states from imposing discriminatory taxes upon railroads in any form whatsoever. Thus, prior to the decision in this case, Section 306 has been used effectively as a tool for eliminating state tax discrimination against railroads.

The Tenth Circuit's decision holds expressly that Section 306 was *not* intended to prohibit all forms of state tax discrimination against rail transportation property. (Appendix A, p. 4a). Its decision leaves the states free to value rail transportation property well in excess of true market value unless plaintiffs can prove that such overvaluation was intentional.

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v. *Lennen*, Case Nos. 82-1562, 82-1561 (D. Kan., filed 12/1/82) (Order granting preliminary injunction in Case No. 82-1562 and Order granting, in part, preliminary injunction in Case No. 82-1561); *Burlington Northern, Inc.* v. *The Department of Revenue of the State of Montana*, CV-80-139-BLG (D. Mont., filed 7/26/83) (Findings of Fact and Conclusions of Law).

[n] *Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983); *Alabama Great Southern R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981).

On its face, Section 306(1)(a) is concerned, not with the *intent* of state officials, but with the *consequences* of state action, i.e., is the ratio of assessed value to true market value of transportation property greater than the ratio of assessed value to true market value of all other commercial and industrial property? If so, Section 306(1)(a) has been violated. The Tenth Circuit has imposed a requirement of intent where none exists under the statute; its decision requires federal courts in Section 306 cases, not only to make the objective comparisons of assessment ratios that Section 306(1)(a) contemplates, but to examine and evaluate the motives of state officials. The Tenth Circuit has, in effect, altered the character of a simple federal statute which, by its terms, requires nothing more than a mathematical equivalence between two ratios.

Obviously, if a state can overvalue railroad property with relative impunity, it can continue to tax railroads in violation of the Act at ratios of assessed value to true market value higher than those applicable to other commercial and industrial property. Thus, the continued utility of Section 306 as a means of preventing state tax discrimination of railroad property is at issue here.

The question presented by this petition for review is, therefore, essentially the same as that presented in a different context by the petitioners in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, this Court granted certiorari in order to resolve the important question of whether the Fourth Circuit had correctly held that a claimant seeking redress under Title VII of the Civil Rights Act of 1964 must demonstrate discriminatory intent. Although Section 306 is addressed to a much narrower problem than Title VII, i.e., discriminatory state taxation of rail transportation property as opposed

to discriminatory employment practices affecting a broad class of citizens, Section 306 is nonetheless important remedial legislation intended by Congress to proscribe conduct which adversely affects the nation's economy.

The railroads respectfully submit that certiorari should issue in order to correct the Tenth Circuit's clear error, to remedy the confusion resulting from the introduction of intent as an element under this statute, and to effectuate Congress' clearly-enunciated policy of eliminating discriminatory state taxation of railroads.[22]

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[22] Petitioners are mindful that this was an appeal pursuant to 28 U.S.C. § 1292(a)(1) from the denial of a preliminary injunction. However, such cases may be reviewed despite their interlocutory status if there is some clear-cut issue of law that is fundamental to the further conduct of the case, particularly where an important jurisdictional question is raised by the decision. See *Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1948). This case meets these criteria. It presents a clear cut issue of law which is fundamental, not only to the further conduct of this case, but to federal cases that are pending in other jurisdictions, e.g., California, Colorado, Iowa, Oklahoma and Utah.

CONCLUSION

The railroads respectfully urge that a decision of such national importance, one which has grave and far-reaching consequences for the financial health of the railroad industry, should be reviewed by this Court and that the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Tenth Circuit.
Aug. 25, 1983.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY; Missouri Pacific Railroad Company; The Kansas City Southern Railway Company; The Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company; St. Joseph and Grand Island Railroad Company, a subsidiary of Union Pacific Railroad Company; and Missouri-Kansas-Texas Railroad Company,

Plaintiffs-Appellants,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and The Department of Revenue of the State of Kansas, an administrative agency of the State of Kansas,

Defendants-Appellees,

Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt Counties, Kansas,

Intervenors.

Everett B. Gibson, Memphis, Tenn. (James W. McBride and Marion F. White, of Laughlin, Halle, Clark, Gibson & McBride, Memphis, Tenn., F. Kent Kalb, Senior Tax Counsel, Union Pacific Railroad Co., Broomfield, Colo., Chester A. Arterburn, Jr. of Sabatini, Waggener, Vincent & Arterburn, Topeka, Kan., and Robert C. Foulston of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., with him on brief), for plaintiffs-appellants.

Carol B. Bonebrake, Kansas Dept. of Revenue, Topeka, Kan. (James J. McGannon of Regan & McGannon, Wichita, Kan., with her on brief), for defendants-appellees.

Robert J. O'Connor of Hershberger, Patterson, Jones & Roth, Wichita, Kan. (Donald J. Horttor and Grant M. Glenn of Cosgrove, Webb & Oman, Topeka, Kan., with him on brief), for intervenors Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips, and Pratt Counties, Kan.

Robert C. Foulston and Jay F. Fowler of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., filed a brief for the Atchison, Topeka & Santa Fe R. Co., Chicago & North Western Transp. Co., Chicago, Rock Island & Pacific R. Co., William M. Gibbons, Trustee, Kansas City Terminal R. Co., and St. Louis Southwestern R. Co., as amici curiae.

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from an order of the district court denying a preliminary injunction sought by the railroad plaintiffs under 49 U.S.C. § 11503 (§ 306).[1]

The railroads sought to prevent the Kansas taxing authorities from collecting 1982 ad valorem taxes, which the railroads asserted were levied against them in violation of § 306. The railroads contended that they were entitled to equalization relief because commercial and industrial property in Kansas was assessed at a median ratio of 11.7% of true market value, while rail transportation property was assessed at no less than 30% of true market value. The trial court granted relief on the

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[1] Enacted originally as § 306 of Pub.L. No. 94-210, 90 Stat. 31, 54 (1976), the section was codified in 1978 as part of the revised Interstate Commerce Act at 49 U.S.C. § 11503. There are some differences in the language between the original section and the codification. This Court, in *Atchison, Topeka & Santa Fe Railway* v. *Lennen*, 640 F.2d 255, 258 (10th Cir. 1981), held that the original § 306 language governs if there are significant differences. The section will be referred to hereafter as § 306, consistent with the treatment in the trial court and the parties' briefs.

equalization issue, allowing the railroads to pay only 39% of their 1982 taxes pending final disposition of the case, which is being held in abeyance pending this Court's resolution of equalization issues in similar cases involving prior tax years. The equalization issue is not involved in the instant appeal.

The railroads also contended that they were entitled to valuation relief because their properties were valued for ad valorem tax purposes at more than true fair market value. The court declined to grant the railroads injunctive relief on the valuation issue, holding that it had no jurisdiction to hear issues of railroad property valuation except when it appears that the state has artifically raised valuations to retaliate against railroads that have obtained equalization relief. The issue in this appeal is the correctness of the trial court's determination.

This Court issued an injunction against collection of the taxes until we could hear argument and deliberate. We ordered the appeal accelerated, heard argument, and now determine the merits of the appeal.

Section 306 provides that a state is engaging in unlawful tax discrimination if it assesses

> transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

§ 306(1)(a), 90 Stat. at 54.

The parties agree that Congress intended to equalize assessment ratios between railroad and other commercial and industrial properties, although differences between them on what properties are compared and other applications of the act in Kansas are before us in other appeals. The parties disagree on whether the act gives the federal district courts jurisdiction to probe into the assessment process itself to determine whether the state taxing authorities have indeed arrived at the

"true market value" of the railroads' property. The railroads offer arguments based upon statutory construction and legislative history that Congress intended the district courts to evaluate the valuation methods and conclusions of state taxing authorities when considering claims of discriminatory taxation. They say that the statute requires comparison of assessments based upon the true market values of different classes of property and that a court cannot possibly determine whether relief is appropriate without being sure that apples are being compared to apples—that is, that the true market value of the railroad property is being compared to the true market value of other commercial and industrial property.

While the railroads' interpretation is a plausible one, we do not think that it is the proper interpretation. Section 306 was enacted to prevent both de jure and de facto discrimination against railroads in the collection of ad valorem taxes. One method of discrimination, prohibited by § 306(1)(c), is expressly imposing a different tax rate on rail property than is imposed on other commercial property. This is de jure discrimination. The most common form of de facto discrimination is imposing the same percentage rate of tax on both classes of property, but applying that rate to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property. The railroads ask us to apply § 306 to another potential form of discrimination, also de facto: taxing both classes of property at the same rate, but assessing rail property at a value higher than its true market value. Relief from this form is what the trial court referred to as valuation relief. *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981), contains a broad statement that the purpose of § 306 was to prevent tax discrimination against railroads "in any form whatsoever." But we think it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination. We believe that important considerations support the trial court's conclusion that the valuation relief sought by the railroads is not provided by § 306.

The language of § 306 does not provide explicit guidance on the range of potential de facto discrimination district courts have the power to remedy. We note, however, that the statute sets forth a specific method of proof of the market value of commercial and industrial property, *see* § 306(2)(e), but contains no discussion of a proper method for valuing rail property. While this absence of specific direction is not dispositive, its significance is underscored by the facts in this case. The railroads' expert would value the rail property in question by essentially the same method—unitary valuation—the state of Kansas employs. It is within the context of this method that the expert disagrees with some of the state's calculations of various factors. While Congress specifically addressed the valuation of commercial property, it did not address the complex problems associated with the valuation of rail property.

The absence of specific statutory direction makes an examination of the legisative history of § 306 appropriate. Such an examination militates against the railroads' position. The district court properly included in the scope of its review of the legislative history predecessors to the bill that ultimately became § 306. *See Arizona* v. *Atchison, Topeka & Santa Fe Railroad*, 656 F.2d 398, 404 n. 6 (9th Cir.1981). We have examined every item of legislative history cited by the district court and every item cited to us by the parties. We think that the district court's opinion fairly recited the pertinent legislative history, which we will not repeat, and that the district court's conclusion was correct. Despite Congress' extensive consideration over a number of years of the problems of tax discrimination, no report or hearing specifically addresses the problems or benefits of involving the district courts in the intricacies of the process of arriving at the valuation of rail property. The history suggests that equalizaton, not valuation, relief was intended to be made available to the railroads. *See* S.Rep. No. 585, 94th Cong., 1st Sess. 139 (1975); S.Rep. No. 1483, 90th Cong., 2d Sess. 22, 23 (1968).

Finally, we consider that § 306 was passed as an express exception to the general proscription on federal interference

with state taxation contained in the Tax Anti-Injunction Act, 28 U.S.C. § 1341. Section 306 obviated the need for the railroads to meet § 1341's required showing that a plain, speedy, and efficient remedy is not available in the courts of the state before the district court can act. There is no express indication in § 306 or in the legislative history that Congress intended the railroads to escape the general noninterference rule of § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis. Such a rule would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions. Absent a specific director from Congress, we are unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property.

The district court declared that it would grant relief under § 306 if the railroad could make a strong showing that state authorities deliberately overvalued the railroads' property in retaliation for past equalization relief the railroads had secured. We agree, but we would hold that a suit can be maintained whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation. We emphasize, however, that a strong prima facie case of retaliation or intentional discrimination must be made. Here, there were substantial increases in the property valuations for most of the railroads involved in this appeal between the 1981 and 1982 tax years. The trial court found, however, that the procedures the state used to arrive at the 1982 unit valuations were identical to those it used over a long prior period and identical to those used to value the properties of the other railroads in Kansas in 1982. We have examined the record and are satisfied that the railroads did not make a sufficient showing of discriminatory overvaluation.

We therefore affirm the district court's denial of injunctive relief. Because we stayed the payment of the portion of the

taxes at issue here pending decision of this appeal, no penalty shall be assessed against the railroads if they pay the taxes that they have withheld because of our grant of a temporary injunction within seven days after the issuance of the mandate in this case.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-1561

BURLINGTON NORTHERN RAILROAD COMPANY., *et al.*,
Plaintifffs,

VS.

C. MICHAEL LENNEN, *et al.*,
Defendants.

Case No. 82-1562

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY CO., *et al.*,
Plaintiffs,

VS.

C. MICHAEL LENNEN, *et al.*,
Defendants.

FILED
DEC -9 1982
ARTHUR C. JOHNSON, Clerk

By/s/ Mellanie Drake
MELLANIE DRAKE
Deputy

MEMORANDUM

On December 1, 1982, this court issued an abbreviated order deciding the pending motions for preliminary injunction filed by the plaintiff railroads in the above-mentioned cases. In that order, we promised that a more detailed memorandum on the

issues decided in the order would follow. This memorandum discusses those rulings.

BACKGROUND

In the instant cases, eleven interstate railroads seek relief under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), now codified at 49 U.S.C. § 11503. Section 306 prohibits discriminatory state taxation of railroads and provides that rail transportation property may not be assessed at a higher ratio of assessed value to true market value than the ratio of assessed value to true market value at which commercial and industrial property within the state is assessed. These cases were originally filed separately, each by a different group of plaintiff railroads. On September 21, 1982, we consolidated these cases for the purposes of discovery and trial pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. In order to fully understand this court's order of December 1, 1982, and this memorandum, it is necessary to examine each of these cases. The plaintiffs in *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, No. 82-1562, consist of the following interstate railroads: Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Transportation Company; Chicago, Rock Island and Pacific Company[1]; Kansas City Terminal Railway Company; and St. Louis Southwestern Railway Company (hereinafter referred to collectively as the Santa Fe plaintiffs). The plaintiffs in *Burlington Northern Railroad Co.* v. *Lennen*, No. 82-1561, include these interstate railroads: Burlington Northern Railroad Company; Missouri Pacific Railroad Company; Kansas City Southern Railway Company; Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company including the

[1] William G. Gibbons is also a named plaintiff in this case. He is the duly appointed and acting trustee of the property of the Chicago, Rock Island and Pacific Railroad Company by virtue of an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on March 28, 1975, in Case No. 75 B 2697.

St. Joseph and Grand Island Railway Company; and Missouri-Kansas-Texas Railroad Company (hereinafter referred to collectively as the Burlington Northern plaintiffs). The defendants in each case are identical. Named as defendants are: C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas; Phillip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and the Department of Revenue of the State of Kansas, an administrative agency of the State. In both cases, the court has allowed certain county officials to intervene.

The claims made by the Santa Fe plaintiffs are identical to those made in previous actions brought under Section 306 of the 4-R Act in this court in 1980 and 1981 by the railroads operating in Kansas.[2] These railroads seek equalization relief

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[2] In 1980, five different actions were filed by the railroads operating in Kansas seeking relief from discriminatory assessments of property taxes on rail transportation property within the State of Kansas under Section 306. These cases were consolidated by this court and are referred to as *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, Nos. 80-4172, 80-4173, 80-4176, 80-4181, 80-1690 (hereinafter referred to as the "1980 tax case"). On April 15, 1982, this court, after a lengthy trial, entered its final order in the 1980 tax case. In that order, the court determined that the provisions of Section 306 had been violated and enjoined the defendants and their agents from assessing and taxing plaintiffs' rail transportation property for the 1980 tax year at a ratio of assessed value to true market value higher than 12.2 percent, which we later amended to 12.4 percent. This decision is currently on appeal.

In 1981, all of the railroads operating in Kansas again filed suit in this court seeking relief under Section 306. This case, *Burlington Northern Railroad Co.* v. *Lennen*, No. 81-1595 (hereinafter referred to as the "1981 tax case"), remains pending in this court. We have entered two preliminary injunctions in the case in favor of the railroads but a trial of the case has not yet occurred. It is anticipated that this case will not proceed any further until a decision is reached by the Tenth Circuit Court of Appeals on the 1980 tax case.

under Section 306. They contend that the defendants have assessed their property in 1982 at a higher ratio of assessed value to true market value than other commercial and industrial property within the State of Kansas. The Santa Fe plaintiffs seek an order prohibiting the defendants from assessing or taking any action to collect 1982 taxes based on assessments that exceed those permissible under law. Presently, these railroads seek a preliminary injunction preventing the defendants and their agents from collecting that portion of their first half 1982 taxes[3] based on assessments that exceed those permissible under Section 306.

The claims made by the Burlington Northern plaintiffs are slightly different. Like the Santa Fe plaintiffs, they seek equalization relief. However, in addition to equalization relief, they seek valuation relief. They contend that the defendants substantially overvalued their property in 1982. This case marks the first time in a Section 306 case before this court that the railroads have contended that the defendants overvalued their rail transportation property. In the past, the railroads have accepted, for the purposes of their Section 306 cases, the defendants' unit valuations of their property. At the present time, these railroads seek a preliminary injunction preventing the defendants and their agents from collecting that portion of their first half 1982 taxes based on assessments and valuations that exceed those permissible under Section 306.[4]

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[3] Under Kansas law, property taxes are paid in two installments. The first half of a taxpayer's property tax is due on December 20. The second half of the tax is due on June 20. K.S.A. 79-2004.

[4] At the hearing on the plaintiffs' motions for preliminary injunction, counsel for the Burlington Northern plaintiffs informed the court that plaintiff Kansas and Missouri Railway and Terminal Company did not wish to be included with the other railroads seeking a preliminary injunction in the valuation issue. Thus, for the purposes of the preliminary injunction, they seek only equalization relief.

On November 23, 1982, this court began hearing evidence on the plaintiffs' motion for preliminary injunction filed in each case. This evidence was eventually concluded on November 29 and we issued the order which preceded this memorandum on December 1, 1982. As we did in our earlier order, we will divide up our discussion in this memorandum in terms of the plaintiffs' request for equalization relief and the plaintiffs' request for valuation relief.

EQUALIZATION RELIEF

The parties have stipulated that the court may consider this evidence presented in the 1981 tax case on the issue of equalization relief for the purposes of determining that issue in these cases. The parties have so agreed because no new additional evidence exists at this time due to the fact that the 1982 Kansas sales assessment ratio study is not yet available. In the 1981 tax case, the plaintiff railroads submitted a sales assessment ratio study prepared by Dr. Frederick Ekeblad that was based upon information from the 1981 Kansas sales assessment ratio study. This study showed that commercial and industrial property in Kansas was assessed at approximately 11.7 percent of true market value. The defendants submitted evidence which demonstrated another method of calculating the assessment ratio of commercial and industrial property in Kansas. It was recognized by the defendants' expert witness, Dr. Darwin Daicoff, during the hearing in the 1981 tax case, that the methodology suggested by the defendants was not in accordance with this court's rulings in the 1980 tax case. Finding the plaintiffs' evidence in accordance with our decision in the 1980 tax case, we found that the plaintiffs had demonstrated reasonable cause to believe that a violation of Section 306 had occurred. Based upon that same evidence, the court makes the same finding in this case. The court will sustain the plaintiffs' motions for preliminary injunction on their request for equalization relief.

VALUATION RELIEF

As aforementioned, the Burlington Northern plaintiffs contend that the defendants overvalued their property in 1982. They contend that the procedures used by the Division of Property of Valuation (hereinafter referred to as "DPV") to value railroads in the State of Kansas are irrational and result in excessive overvaluation. They further assert that they were overvalued in 1982 in retaliation for relief they were awarded by this court in the 1980 tax case. These railroads suggest that the court lower their 1982 unit valuations to their 1981 unit valuations. The defendants have strenously objected to the court examining the "true market value" of each of the Burlington Northern plaintiffs.

The plaintiff railroads argue that the plain language of Section 306 requires the court to first make a determination of the true market value of a railroad system's property before conducting the equalization of railroad property taxes with all other commercial and industrial property taxes. Moreover, they contend that this court has already determined, in the 1980 tax case, that the issue of valuation of the railroads is an appropriate one in a Section 306 case. Further, the railroads assert that the defendants are now taking a contrary position on this issue to the one they asserted in the 1980 tax case. They contend that the defendants, in that case, argued that the question of the "true market value" of the railroads was indeed an issue in a Section 306 action.

It is the defendants' position that the court has no jurisdiction under Section 306 to consider the unit valuations of the plaintiff railroads. Essentially, they contend that the valuations determined by them are the valuations against which this court must apply the standards of Secton 306. The defendants assert that the legislative history of Section 306 demonstrates that Congress did not intend to extend Section 306 to valuation questions. Further, they submit that the railroads, in urging the court to redetermine their valuations, are requesting that the court ignore the prohibition against the federal courts assessing or levying taxes established in *Moses Lake Homes*,

Inc. v. *Grant County*, 365 U.S. 744 (1961). Finally, the defendants suggest that the plaintiff railroads have "grossly" misconstrued the position they took on valuation in the 1980 tax case.

The court did consider, at least to a certain extent, the issue of valuation in the 1980 tax case. At that time, however, the issue was raised in a slightly different context. The defendants and the country intervenors had, from the outset of the 1980 tax case, contended that the court could not compare the unit valuation method of appriasal used on railroads with the segregated valuation appriasal approach used on other commercial and industrial property in Kansas. In this regard, they argued that it was necessary for the court to determine the true market value of each railroad under a segregated approach in order to be able to compare it with other commercial and industrial property in the State of Kansas under the provisions of Section 306. The defendants admitted that they had properly valued the plaintiff railroads under the unitary method but asserted that the segregated approach would achieve a different value. In a motion in limine filed prior to the trial of the 1980 tax case, the railroads sought an order prohibiting the introduction of evidence on their value because valuation was not an issue in the case. After a review of the legislative history on the particular point presented, we declined to hold as a matter of law that the defendants could not present evidence based on their arguments regarding valuation. This court must note that this ruling was made in part in an effort to hear as much evidence as possible in this relatively new area of law. After hearing all of the evidence in the case, we concluded that the Director of the DPV had properly valued the plaintiffs' property under the unitary method of appriasal and accurately arrived at the true market value of the plaintiffs' property for the 1980 tax year. Considering the context in which the issue was raised in the 1980 tax case, we do not consider our earlier ruling determinative of the issue presented herein. We now move to a thorough and detailed discussion of the issue of valuation in an action brought under Section 306.

Section 306 provides that a state is engaging in unlawful discrimination if it assesses:

> transporation property at a value which bears a higher ratio to the *true market value* of such transportation property then the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the *true market value* of all such other commercial and industrial property. (Emphasis added.)

The issues of "true market value" and valuation of rail transportation property were raised and discussed in the reports and during the hearings that proceeded the passage of Section 306 of the 4-R Act.[5] It appears that Congress first discussed the concern of true market value in 1968 when it was considering S. 927, one of the several precursors to Section 306. In a report on that bill, the Senate Committee on Commerce stated:

> In order to avoid any question as to the meaning of the phrase "true market value" as used in S. 927, the committee accepts the definition of this phrase as set forth in appendix B attached to this report. The committee intends by the phrase "true market value" the meaning set forth in appendix B.

S.Rep. No. 1483, 90th Cong., 2nd Sess., p. 10 (1968).

Appendix B to S.Rep. No. 1483 stated as follows:

> True market value is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than true market value may be computed. In an authoritative treatise

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[5] Before passing Section 306, Congress had considered proposals virtually identical to it since 1961. It is well-established that legislative proposals which were not enacted, but which antedate statutory provisions under consideration by a court, are relevant and material to a complete understanding of the statute. *United States* v. *Enmons*, 410 U.S. 396; 404 n.14 (1973); *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601, 605-06 n.6 (1948); *State of Arizona* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981).

published by the National Association of Tax Administrators, the following statement appears:

"The statutes of the several States prescribing the value standard for tax purposes use such terms as 'fair market value,' 'fair cash value,' 'full market value,' and the like. All of these terms are synonymous; they mean nothing more and nothing less than what we mean in this report by the term 'market value' or the work 'value' without a qualifying adjective."

These have been judicially defined in numerous cases. *New York Bay R. Co.* v. *Kelly*, 22 N.J. Misc. 204, 37 A. 2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co.* v. *Sugg* (Tex. Civ. App.), 68 S.W. 2d 570, 572 (1934); and *Guyandotte Valley R. Co.* v. *Buskirk*, 57 W.Va. 417, 50 S.E. 521, 526 (1905).

The proportion of "true market value" at which assessments are finally fixed varies among the several States. In some States, the law requires assessment at true market value, in others at 60 percent thereof, in others at 35 percent, et cetera.

Railroad property in most of the States is valued and assessed as a unit; that is, the whole system as it exists in 8, 10, or 15 States is valued; this value is distributed among the several States on the basis of recognized allocation factors; and then, in turn, the value in a particular State is apportioned among the several taxing districts in that State on the basis of mileage. In other words, when railroads are assessed as a unit the total value is first determined and then apportioned; the total assessment is not determined by adding the assessed value of individual items that make up the railroad plant.

As to the few States in which railroad property is locally assessed there is no specific information concerning the assessment methods.

S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been deter-

> *mined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.* (Emphasis added.)

The language contained in Appendix B that S. 927 was not a standard for detemining value but was a standard for comparing values already determined had apparently been adopted from a statement given previously by James N. Ogden, Vice President and General Counsel of the Gulf Mobile and Ohio Railroad Company, during hearings before a Senate subcommittee on S. 927 on August 7 and 8, 1967. Speaking on behalf of the Association of American Railroads, Mr. Ogden had stated:

> . . . *S.927* does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. *It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.* (Emphasis added.)

Hearings Before the Subcommittee on Surface Transportation of the Committee on Commerce on S. 927, 90th Cong., 1st Sess., p. 29 (1967).[6]

On July 30, 1969, hearings were conducted before the Senate Subcommittee on Surface Transportation of the Committee on Commerce on S. 2289, the successor to S. 927. During these hearings, the question of whether the federal courts would be empowered to reexamine the valuation of a railroad's property arose on two occasions. The issue was first raised during the following colloquy between Wyoming Senator Clifford P. Han-

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[6] Mr. Ogden had first made these comments on July 28, 1964, in a hearing before the House of Representatives' Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 736, 10169, forerunners of Section 306.

sen and Phillip M. Lanier, Vice President-Law, Louisville and Nashville Railroad Company, who at the time was speaking on behalf of the Association of American Railroads:

> Senator HANSEN. Is this same formula—this same three-factor formula in use for the purposes of this study throughout the country, or is this only the way it is done in Wyoming?
>
> Mr. LANIER. *The formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate.* (Emphasis added.)

Hearings Before the Subcommittee on Surface Transportation of the Committee on Commerce on S. 2289, 91st Cong., 2nd Sess., p. 39 (1969).

The issue was again raised in a question by Senator Hansen to Broley E. Travis, a consulting valuation engineer:

> Senator HANSEN. Thank you very much, Mr. Travis. I'm sure the committee will be impressed with your observations.
>
> You have been in this business for a long time, and I think you have made a most commendable contribution toward a more complete understanding of the problem.
>
> Thank you, sir.
>
> I do have one question, Mr. Travis. It has been handed to me. An objection to this legislation which has come to my attention is the possibility that the bill would require the Federal courts to review and determine the correctness of not only valuation procedures and actual valuation results for the carriers, but also the entire work of each assessing agency with respect to all properties. This is so, it is alleged, because the bill contemplates the determination of values. This committee's report of last year considers this problem in appendix B, but for the record, I would like your views on the validity of this argument.
>
> Mr. TRAVIS. Well, I believe, it would be my impression, being an engineer, and not an attorney, *that the Federal court would have to review both the valuation as made by the administrative officers, and the equalization.*

Now, it is the duty of the complaining taxpayer to prove the valuation is too high, and it is his duty to prove what the assessment ratios are in the county or the State or whatever the division is that he is operating in, in which he is complaining of such matters.

So the burden of proof is upon the taxpayer to present such evidence to the court in order to guide the court in its judgment.

Senator HANSEN. Is it your understanding that this bill could very well contemplate and recognize the continuance of a situation wherein one State might value pieces of property and miles of track, say, at twice the amount at which another State might fix the value, and yet the action of neither State would be discriminatory if all of the other properties within the two respective States were assessed in a comparable fashion?

Mr. TRAVIS. *As a technician, to me, assessment has to start with valuation. That's where you start. And you find the market value of the property, whether you are assessing a house or a railroad.* That's the yardstock that is common to every place. (Emphasis added.)

Id. at p. 59.

In the report that followed on S. 2289, the Senate Committee on Commerce rejected the viewpoint of Mr. Travis and once again adopted the view that S. 2289, like S. 927, was not intended as a standard for determining value. See S.Rep. No. 91-630, 91st Cong., 1st Sess., pp. 10, 25-26 (1969). The issue of valuation was again raised in 1970 in a hearing before a House of Representatives' subcommittee on H.R. 16245. Philip M. Lanier told these members of Congress that the bill did not give the federal courts the right to redetermine valuation:

Mr. LANIER. *On the valuation—this bill would not deal with valuation being standard.The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.*

The short answer, if I may give it this way, and I think it will be clear, is that for valuation purposes different kinds of property put to different uses do require different methods of valuation. And the method of valuation applied

to a railroad is quite different from that which is applied to a residence, a farm, factory, whatever it may be. And that is appropriate because it is the way to get at the real value. There is nothing in this legislation—and we have no brief here to alter that—it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is.

Mr. [Brock] ADAMS [Representative from the State of Washington]. On page 2 of the bill it says, "The assessment"—which is what the tax collector comes in on—"for purposes of a property tax"—and that is all I am talking about here now—"owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all other such property."

That appears to me that you are taking into account both valuation and assessment.

Mr. LANIER. I think I can answer it this way.

Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads puts a value—a fair market value, true market value, the words means the same—on that railroad property and the local assessor in the towns you refer to puts a true market value on the residences. *After that is done, this bill would come into play.*

Mr. ADAMS. But that help could not—if, for example, vacant property in that area with no buildings on it was assessed at, we will say, 100 by 100 lot, would be assessed at $5,000—with a building on it, of course, valuation is going up—so then if your railroad property was assessed at more than that, under this bill—this is what I am asking you—I think you pobably would have an automatic lawsuit that would say the value of a piece of real property with two rails on it and no other improvements should not be any higher than either vacant property plus the value of the rails.

Unless, of course, you are using this unitary system that you mentioned which would take into account a lot of

other factors, and since Mr. Smith is talking about real property and assessment and the bill, I am just asking you how it works.

Mr. LANIER. Let us assume that the vacant lot is assessed at $5,000, that is the fair market value of that lot. Now, in Washington the equalization ratio is 50 percent.

Mr. ADAMS. In Washington it is 50 percent. There is a fight going on because nobody is assessing at 50 percent. In some counties it is 20 and in others it is 32 and in others it is 56. I you have a lot of lumber in a particular county, a lot of trees, you get a low assessment rate—

Mr. LANIER. Let's take the 50 percent then, so that that vacant lot actally carriers a tax on $2,500. Now let us assume that a portion of the right-of-way of the railroad equivalent in the area in that town to the vacant lot carriers a value, fair market value determined by the State assessing authority of $20,000, if it is equalized at 59 percent, the tax goes against only $10,000. That is all this bill requires, and that is all we ask for.

Because we are speaking in terms of uniformity of the equalization ratio, not uniformity of the result in dollars of value or in dollars of tax, *but only that once the fair market value is determined, the equalization ratio will be the same*. And since you would have a 50 percent ratio in each instance, we would have absolutely no complaint and no grounds for complaint. (Emphasis added.)

Hearing Before the Subcommittee on Transportation anmd Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245, 91st Cong., 1st Sess., p. 138-39 (1970).

From the aforementioned legislative history of Section 306, several things are apparent. Congress on several occasions considered the issue of whether this legislation to make unlawful discriminatory taxation against rail transportation property would require the federal courts to reveiw and determine the correctness of the valuation procedures and the actual valuation results for the railroads by each state assessing agency. It appears clear the Congress did not intend to place this burden on the federal courts. Discriminatory valuation of the railroads, although mentioned on a few occasions during

the course of the passage of Section 306, was not the problem that Congress sought to remedy in the passage of Section 306. The purpose of the bill was to provide relief for the railroads from discriminatory taxes through improper assessments or rates. We simply do not believe that Congress intended for the federal courts to become involved in establishing new or better procedures for the states in the valuing of railroads. Section 306 simply provides a standard to which values that have already been determined must be compared. Accordingly, we believe that the issue of the appropirate "true market value" of a railroad is generally not to be an issue in a Section 306 case.

Other courts which have considered this issue have arrived at conclusions similar to that reached by this court. In *Louisville & Nashville Railroad Co.* v. *Louisiana Tax Comm.*, 498 F.Supp. 418 (M.D. La. 1980), the defendant argued that the unit method they utilized to value railroads produced a lower value than other appraisal methods utilized on commercial and industrial property. The court refused to hear evidence based on defendant's argument, stating:

> The Federal Statute [Section 306] is quite clear. It leaves the States the appraisal method or methods to be utilized in determining 'fair market value' or 'true market value.' It simply provides that after fair market value has been determined the States may not discriminate against rail transportation property and if the discrimination exceeds the 5% prohibition, then the District Courts may grant injunctive relief.

Id. at 421.

In *Burlington Northern Inc.* v. *Department of Revenue of the State of Montana*, No. CV-80-139-BLG (D. Mont., unpublished, 7/26/82), the issue of the valuation of rail transportation property was raised and thoroughly considered. In that case, the defendant had sought to show that it had valued the plaintiff railroads' property at less than true market value. The railroads had argued that the defendant should be stopped from discrediting valuations based upon the mandates of Montana taxation statutes and the defendant's own regulations.

However, in addition, the railroads had raised the valuation issue in anticipation of its use as an affirmative defense by the defendant. The court made the following findings:

> The Court further believes that the DOR should not be permitted to, in essence, revalue and reappraise the railroad property under the guise of seeking true market value for such property. The DOR must utilize and adopt the unit valuation of the railroads which it certified in 1980.
>
> * * * * *
>
> We find that valuation is not an issue which should be addressed in this case. Each party must accept the property valuations actually determined by the DOR.

The court then concluded:

> Section 306 affords each state broad discretion concerning methods of valuation and appraisal in property taxation. Thus, market value determinations are left to a state's discretion provided the result of the valuation process is not discriminatory against railroads. *State of Arizona* v. *Atchison, T. & S.F. R.*, 656 F.2d at 408 n. 9. *Louisville & Nashville Railroad Company* v. *Louisiana Tax Commission, supra.*
>
> * * * * *
>
> The DOR has previously determined the true market value of the railroad through the unit valuation method. It cannot not now search for a "new" or "more correct" market value in order to pass scrutiny under § 306. Section 306 gives the DOR options regarding how market value is determined. Once market value is found and the taxation scheme is then found to be discriminatory against the railroads, the Act does not allow the DOR to then seek a new method of valuation in an effort to fall within the 5% limits of § 306(c). Such post-comparison tactics are, at best, an illusory compliance wth § 306.

In sum, we believe that Congress did not intend the federal courts to become involved in the issue of valuation of the railroads. In light of this ruling, the court finds it unnecessary at this point in the opinion to consider the contentions raised by the defendants regarding the doctrine established in *Moses Lake Homes, Inc.* v. *Grant Country, supra.*

The court does wish to note what we believe to be an exception to the general rule that Congress did not intend the federal courts to get involved in valuation problems in Section 306 cases. We do believe that a court, under the equity power vested in the federal courts by Congress under Section 306, could examine the valuation established by a state where a railroad has shown that a state overvalued its property in retaliation for past relief accorded under Section 306. In passing Section 306, Congress provided the federal courts with significant equity power to remedy discriminatory taxation of rail transportation property. The court has examined in some detail this grant of equity power in the 1980 tax case. In that case, we found the grant of equity power under Section 306 insufficient to award retroactive relief to the railroads for alleged discriminatory taxation in 1979. We reached that decision based upon the language of Section 306 and the legislative purpose of the statute. We do not find the considerations noted in that case to be applicable here in considering whether a court may remedy, under its broad equity power, overvaluation in retaliation for past relief accorded under Section 306. Nor do we find the creation of this exception to contravene the *Moses Lake* decision. In that case, the Supreme Court held that a federal court may not make the adjustment necessary to make an invalid tax valid. The courts are limited to determining whether existing taxes are valid, and have no power to substitute a valid tax for the invalid tax. Here, the court is simply fashioning an equitable remdy to protect a substantive right which Congress has established. This right is the right of a railroad to be free of discriminatory assessment. The *Moses Lake* decision did not suggest that federal courts could not fashion measures to achieve this result. This court would only be protecting a right given under federal law and we do not find *Moses Lake* to prohibit this action.

Of course, the Burlington Northern plaintiffs do content that the defendants overvalued their property in 1982 in retaliation for relief they received in the 1980 tax case. To determine whether retaliation was present in the defendants' 1982 valua-

tions of these five railroads, it is necessary to consider the testimony and evidence that was presented by the parties. The court heard from three witnesses, the Director of the DPV, a member of the staff of the DPV, and the plaintiffs' expert witness.

Under Kansas law, the fair market value of the plaintiffs' rail transportation property is determined by the unitary method of appraisal, i.e., valued as a "going concern." Specifically, K.S.A. 79-5a04 provides, in pertinent part:

> The division of property valuation in determining the fair market value of public utility property shall, where practicable, determine the unit valuation, allocated to Kansas, and in doing so shall use generally accepted appraisal procedures developed through the appraisal process and may consider, including but not by way of exclusion, the following factors:
>
> (1) Original cost.
>
> (2) Original cost less depreciation or reproduction cost less depreciation, or both, or replacement cost new less depreciation, except that where either method is used proper allowance and deduction shall be made for functional or economic obsolescence and for operation of nonprofitable facilities which necessitate regulatory body approval to eliminate.
>
> (3) The market or actual value of all outstanding capital stock and debt.
>
> (4) The utility operating income, capitalized in the manner and at such rate or rates as shall be just and reasonable.
>
> (5) Such other information or evidence as to value as may be obtained that will enable the property valuation department to determine the fair market value of the property of such public utility.
>
> The fair market value of affiliated properties separately assessed, or the nonoperating properties of such companies, or both, shall be ascertained and determined as nearly as possible and deducted from the total unit value of the properties of such companies if such properties are included in the unit value. Except for the property of any

> entity enumerated in subsection (b) of K.S.A. 79-5a01, as amended, and insofar as it is practicable to do so, the same method of evaluating the properties of the companies separately assessed or nonoperating properties, or both, shall be used as was used in determining the unit value of such companies. All property of any entity enumerated in subsection (b) of K.S.A. 79-5a01, as amended, shall be valued by the county or district appraiser in the same manner as provided by law for the valuation of the same type or class of property in the county.

Charles Burkhart, supervisor of the utility bureau within the DPV, testified that the staff of the DPV, under his supervision, formulates the figures for the various factors articulated in K.S.A. 79-5a04. The staff arrives at the figure on each factor, commonly referred to as an "indicator of value," based essentially upon information received from each railroad. These indicators of value for each railroad, along with the DPV's indicators of value for each railroad for the two preceding years, are then sent to defendant Phillip Martin, the Director of the DPV. Defendant Martin examines the various indicators of value, correlates them, and then arrives at a final unit value for each railroad.

Dr. Arthur Schoenwald, a consultant in the area of valuing railroads, testifying on behalf of the railroads criticized the work of the DPV. As to each railroad, he found fault with the DPV's indicator of value figures and their ultimate correlated value. His criticisms centered primarily around the procedures utilized by the staff and the Director of the DPV to achieve their figures.

After carefully considering the evidence on overvaluation, we do not find that the plaintiffs have demonstrated reasonable cause to believe that the defendants retaliated against them for relief received in the 1980 tax case. We reach this conclusion based on several facts adduced during the evidence that was presented. The procedures used by the defendants to arrive at the 1982 unit valuations were identical to the procedures used by the defendants for over ten years to value railroads operating within the State of Kansas. Further, these procedures

were identical to those used to value the other railroads within the State of Kansas in 1982. It appears that the railroads have long been dissatisfied with the procedures used by the defendants to value railroad transportation property in Kansas. The procedures utilized in 1982 certainly were not just instituted in order to create a higher value for the railroads. The court found the explanations offered by defendant Martin for the increases in the 1982 valuations of the Burlington Northern plaintiffs to be credible. In sum, we find that the plaintiffs have failed to adequately demonstrate any retaliation by the defendants in their 1982 valuations of the Burlington Northern plaintiffs. Further, even if we were to consider simply the issue of overvaluation, we do not find that the plaintiffs demonstrated reasonable cause to believe that the defendants, under the standards provided under Kansas law, overvalued the plaintiffs' property in 1982. In sum, we refuse to grant any relief to the Burlington Northern plaintiffs based on alleged overvaluation.

Our decision, however, does not mean that the railroads are without a remedy to correct overvaluation of their property by the defendants. The railroads have several avenues available to them under Kansas law to challenge overvaluation by the defendants.

The railroads receive their first opportunity to challenge overvaluation in Kansas following the receipt of their final correlated unit valuations from the Director of the DPV. At this time, each railroad has an opportunity to request a hearing with the Director in order to discuss, criticize or request a change in the final valuation figure. After the hearing, the railroads are notified of their final unit value. The court recognizes that this is often an ineffective practice for the railroads, particularly when they seek to challenge the procedures utilized by the DPV to make their calculations. However, Kansas law does provide the railroads with an opportunity to challenge their valuation before the Kansas Board of Tax Appeals. K.S.A. 74-2438. Then, if they are not satisfied with the decision reached by the Board of Tax Appeals, they may seek relief in state court. K.S.A. 74-2426.

Here, the Burlington Northern plaintiffs did not challenge their valuations before the Board of Tax Appeals within the prescribed time limits of K.S.A. 74-2438. Thus, it appears that the railroads are precluded from challenging their valuations under K.S.A. 74-2438. However, it does appear that an alternative is available to the railroads, the tax protest procedures of K.S.A. 79-2005. K.S.A. 79-2005 allows a taxpayer in Kansas to pay his tax under protest and then challenge the tax before the Board of Tax Appeals. There was some question raised during the instant hearing as to whether the railroads could, like other taxpayers in Kansas, use the pay under protest procedures of K.S.A. 79-2005. This issue arose in the 1980 tax case and we stated the argument of the parties as follows:

> The plaintiffs contend that a recent amendment (Chapter 315 of the 1980 Kansas Session Laws) to K.S.A. § 79-2005, the Kansas tax protest provision, has eliminated their remedy. The amended version of K.S.A. § 79-2005 contains a new subsection which reads:
>
> > (n) *This statute shall not apply to the valuation and assessment of property assessed by the director of property valuation* and it shall not be necessary for any owner of state assessed property who has an appeal pending before the board of tax appeals, to protest the payment of taxes under this statute solely for the purpose of protecting the right to a refund of taxes paid under protest should that owner be successful in that appeal. (Emphasis added.)
>
> The plaintiffs rely on the language underlined above for their position that subsection (n) forecloses the use of K.S.A. § 79-2005 to the railroads. It is the defendants' position that this subsection, read in its entirety, does not exclude the use of this remedy by the plaintiff railroads. They assert that if plaintiffs' contention were correct, it would be impossible for the owner of state assessed property to pay his taxes under protest. Furthermore, they believe that the plaintiffs' position would make much of subsection (n) contradictory and meaningless.
>
> We concluded:
>
> The court is in full agreement with the defendants when they state that subsection (n) is "not the model of legisla-

tive clarity." It is indeed a rather confusing and poorly written piece of legislation. This court believes that subsection (n) must be read as interpreted by the defendants. The legislative history of the amendment to K.S.A. § 79-2005 supports the conclusion that subsection (n) was not intended to eliminate the right of railroads to use the protest and refund procedures of K.S.A. § 79-2005.

Thus, we believe that the railroads have the procedures under K.S.A. 79-2005 available to them as an option to challenge their valuation.

CONCLUSION

This memorandum thoroughly discusses the rulings made in our order of December 1, 1982. We hope it is some assistance in understanding that order.

Dated this 9th day of December, 1982, at Topeka, Kansas.

/s/ Richard D. Roger
RICHARD D. ROGER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-1561

BURLINGTON NORTHERN RAILROAD COMPANY, et al.,
Plaintiffs,

vs.

C. MICHAEL LENNEN, et al.,
Defendants.

Case No. 82-1562

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al.,
Plaintiffs,

vs.

C. MICHAEL LENNEN, et al.,
Defendants.

FILED
DEC 1 1982

ORDER

The above-mentioned cases are more in a series of lawsuits brought by the railroads operating in the State of Kansas alleging that the defendants are violating Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), now codified at 49 U.S.C. § 11503. These cases are presently before the court upon the plaintiffs' motions for preliminary injunction. The court has taken evidence and heard arguments on these motions and is now prepared to rule.

The court shall issue this rather short order and then follow it up in the next few days with a more detailed memorandum. This procedure will enable the plaintiffs to pay the first half of their 1982 taxes, which are due on December 20, in a timely fashion.

In the past, the railroads have sought relief under Section 306 of the 4-R Act for the 1979, 1980 and 1981 tax years. In the instant cases, the railroads seek tax relief for the 1982 tax year. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, Case No. 82-1562, five interstate railroads seek equalization relief under Section 306 similar to that requested in prior actions. In *Burlington Northern Railroad Co.* v. *Lennen*, Case No. 82-1561, six interstate railroads seek equalization relief under Section 306 as well as relief from alleged overvaluation.

The court shall first consider the issue of equalization relief. The parties have stipulated that the court may consider the evidence presented in the 1981 tax case on the issue of equalization relief for the purposes of determining that issue in these cases. Based upon that evidence, the court will sustain the plaintiffs' motion for preliminary injunction on their request for equalization relief and enter an order similar to those entered in the 1981 tax case.

The court shall now consider the issue of valuation. In prior cases, the railroads have accepted, for the purposes of their Section 306 cases, the defendants' system valuations of their property. In Case No. 82-1561, the railroads do challenge the defendants' 1982 system valuations and allege that those valuations substantially exceed true market value. The railroads assert that the overvaluations occurred in apparent retaliation for the relief granted to them by this court in their 1980 tax case. The defendants have argued that the court has no jurisdiction under Section 306 to consider the proper valuation of the railroads.

After carefully examining the issue of valuation, the court finds from a thorough review of the legislative history of Section 306 that Congress did not generally intend the courts to

examine the issue of the valuation of the railroads in actions brought under Section 306. However, we do believe that the court has jurisdiction to consider a situation where a state attempts to circumvent Section 306 by overvaluing a railroad in retaliation for past relief accorded under Section 306 of the 4-R Act. After carefully reviewing the evidence presented in this case, we do not find that the railroads have demonstrated reasonable cause to believe that a violation of Section 306 has occurred on the issue of valuation. The railroads have failed to adequately show that any increase in the valuation of their rail transportation property was due to improper motivation by the defendants. Further, even assuming that the court could consider an ordinary overvaluation case under Section 306, we do not find that the railroads have shown that the defendants overvalued their property under the guidelines established by Kansas law. In sum, we refuse to grant any relief to the plaintiffs based on alleged overvaluation. We intend to elaborate upon these findings in our later memorandum.

IT IS THEREFORE ORDERED that the plaintiffs' motion for a preliminary injunction in Case No. 82-1562 be hereby granted.

IT IS FURTHER ORDERED that the plaintiffs' motion for a preliminary injunction in Case No. 82-1561 be hereby granted in part and denied in part.

IT IS FURTHER ORDERED that defendants, their successors, their agents or employees, and those in active concert or participation with them are preliminarily enjoined and restrained until further order of this court, from collecting those portions of the property tax payments from the plaintiff railroads that are in dispute in this litigation; the portion in dispute amounts to 61% of the plaintiffs' 1982 property taxes. The defendants, their agents or employees, and those in active concert or participation with them shall refrain from taking any action to collect those portions of plaintiffs' first half 1982 taxes that are in dispute in this litigation or to penalize the plaintiffs for their failure to pay any portion of the taxes withheld with the court.

The defendants are advised that this injunction applies to the collection of taxes assessed on all railroad transportation property owned by the following plaintiffs:

The Atchison, Topeka, and Santa Fe Railway Company;

Burlington Northern Railroad Company;

Chicago and Northwestern Transportation Company;

Chicago, Rock Island, and Pacific Railroad Company;

The Kansas City Southern Railway Company;

The Kansas and Missouri Railway and Terminal Company; Kansas City Terminal Railway Company;

Missouri-Kansas-Texas Railroad Company;

Missouri-Pacific Railroad Company;

St. Louis-Southwestern Railway Company; Union Pacific Railroad Company; and

St. Joseph and Grand Island Railway Corporation.

Plaintiff, Chicago, Rock Island, and Pacific Railroad Company is unable to tender payment of any part of its taxes because of proceedings for reorganization of the company pending in the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS FURTHER ORDERED that this injunction shall apply to the county treasurers of the State of Kansas and they shall refrain from taking any action to collect plaintiffs' first half 1982 property tax or to penalize the plaintiffs for their failure to pay any portion of the taxes withheld.

IT IS FURTHER ORDERED that each of the plaintiffs, with the exception of the Chicago, Rock Island and Pacific Railroad Company, submit a verified financial statement establishing sufficient net worth to indemnify the defendants and all affected Kansas counties from any damages or taxes later determined to be due should this preliminary injunction be found to have been wrongfully obtained in whole or in part.

IT IS FURTHER ORDERED that this preliminary injunction shall be effective until further order of the court.

IT IS FURTHER ORDERED that the clerk of the court serve this order on all of the county treasurers in the State of Kansas, in addition to the parties in this case.

IT IS SO ORDERED.

Dated this 1st day of December, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

APPENDIX D

SEPTEMBER TERM - September 28, 1983

Before Honorable Oliver Beth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*
Plaintiffs-Appellants,

vs.

C. MICHAEL LENNEN, *et al.*,
Defendants-Appellees.

This matter comes for consideration of Appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge William J. Holloway, Jr., took no part in these proceedings.

/s/ Howard K. Phillips, Clerk
HOWARD K. PHILLIPS, CLERK

APPENDIX E

SEPTEMBER TERM - October 13, 1983

Before Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*
Plaintiffs-Appellants,

v.

C. MICHAEL LENNEN, *et al.*
Defendants-Appellees.

This matter comes on for consideration of appellants' motion for stay of mandate in the captioned cause pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandate shall be stayed until November 14, 1983, pending certiorari and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that the appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

/s/By Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

APPENDIX F

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

[49 USC 26C.] "SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the name assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

[District courts, jurisdiction.] "(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equi-

table relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—[Definitions.]

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.".

APPENDIX G

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the

jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Pub.L. 95-473. Oct. 17, 1978, 92 Stat. 1445.

APPENDIX H

NOVEMBER TERM—DECEMBER 17, 1982

Before Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellants,

THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY,
Plaintiff,

vs.

C. MICHAEL LENNEN, *etc., et al.*,
Defendants-Appellees,

BOURBON, DECATUR, ELK, FRANKLIN, GOVE, LANE, LINN, MARSHALL, MIAMI, NORTON, PHILLIPS and PRATT COUNTIES, KANSAS,
Intervenors.

This matter comes on for consideration of the emergency motion of the plaintiffs-appellants, Burlington Northern Railroad Company, et al. for entry of an injunction pending appeal to restrain the defendants and all persons acting in concert with them from levying or collecting first half taxes on tax payers' property which are due December 20, 1982, on the grounds that the defendants have over valued the plaintiffs' property for ad valorem tax purposes in violation of § 306 of P.L. 94-210, 90 Stat. 54, Feb. 5, 1976 (codified at 49 U.S.C.A. § 11503).

Upon consideration whereof, it is the order of the Court as follows:

It is ordered that the temporary injunction shall issue as requested. The defendants-appellees, C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas, etc., and the parties named with him in the caption of this order, and their successors, their agents or employees and all in active concert or participation with them, are enjoined and restrained until the further order of this Court from collecting the first half of plaintiffs-appellants' 1982 property taxes on any portion in excess of the value assigned to such property by the defendants for the 1981 tax year.

It is further ordered that the defendants-appellees, C. Michael Lennen, et al., named in the caption of this order shall file a response with the Clerk of this Court on or before December 28, 1982, and show cause why the temporary injunction entered this date should not be made permanent pending appeal.

The Clerk of this Court shall notify the attorneys of record of the existence of this order by telephone this date and by mailing copies hereof to said attorneys.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX I

Pursuant To Rule 28.1 Of The Revised Rules Of The United States Supreme Court, A List Of Parent, Subsidiaries (Other Than Wholly Owned) And Affiliated Companies Of Each Petitioner Is Set Forth Below:

Burlington Northern Railroad Company is a wholly owned subsidiary of Burlington Northern Inc. Its subsidiaries which are not wholly owned are:

The Belt Railway Company of Chicago (7.69%)
Camas Prairie Railroad Company (50%)
Chicago Union Station Company (25%)
Davenport, Rock Island and North Western Railway Company (50%)
The Denver Union Terminal Railway Company (33.33%)
Galveston Terminal Railway Company (50%)
Houston Belt & Terminal Railway Company (12.5%)
Iowa Transfer Railway Company (25%)
Kansas City Terminal Railway Company (16.67%)
Keokuk Union Depot Company (40%)
The Lake Superior Terminal and Transfer Railway Company (66.67%)
Longview Switching Company (33.33%)
The Minnesota Transfer Railway Company (33.33%)
Paducah & Illinois Railroad Company (33.33%)
Portland Terminal Railroad Company (40%)
The Pueblo Union Depot and Railroad Company (25%)
The Saint Paul Union Depot Company (40.2%)
Terminal Railroad Association of St. Louis (12.5%)
Trailer Train Company (9.76%)
The Wichita Union Terminal Railway Company (33.33%)
Winona Bridge Railway Company (66.67%)

Its affiliates are:

BN Financial Services Inc.
Burlington Northern Airmotive Inc.
Burlington Northern International Services Inc.
Burlington Northern Trading Company Inc.
Colt Intermodal Inc.

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* Publicly Traded

Glacier Park Company
Dreyer Bros., Inc.
Glacier Park Boulder Company
Glacier Park Denver Company
Tennessee Glacier Park Company
Washington Glacier Park Company
Glacier Park Liquidating Company
Meridian Land & Mineral Company
Milestone Petroleum Inc.
Butte Pipe Line Company (10%)
Northern Rockies Pipe Line Co.
Osage Milestone Petroleum Inc.
Portal Pipe Line Company (50%)
Saxony Corporation
New Mexico and Arizona Land Company (50%)
NZ Development Corporation
NZ Properties, Inc.
Plum Creek Timber Company, Inc.
R-H Holdings Corporation
The El Paso Company (48%)

The Union Pacific Railroad Company and the Missouri Pacific Railroad Company are the wholly owned subsidiaries of Pacific Rail Systems, Inc. which in turn is the wholly owned subsidiary of Union Pacific Corporation. Their subsidiaries (except wholly owned) and affiliates are:

Bear Creek Uranium Company
Black Butte Coal Company
Camas Prairie Railroad Company
Carbon County Coal Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
The Ogden Union Railway and Depot Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company

Southern Illinois and Missouri Bridge Company
St. Joseph Terminal Railroad Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Unita Development Company
Union Pacific Resources Ltd.
The Weatherford Mineral Wells and Northwestern Railway Company

Kansas City Southern Railway Company is the wholly owned subsidiary of Kansas City Southern Industries, Inc. It has no subsidiaries which are not 100% owned. Its affiliates are:

Joplin Union Depot
Kansas City Terminal Railway Company
Trailer Train Company
Veals, Inc. (wholly owned by Kansas City Southern Industries, Inc.)
Carland, Inc. (wholly owned by Kansas City Southern Industries, Inc.
* DST, Inc. (86% owned by Kansas City Southern Industries, Inc. and 14% publicly traded)
Wall Street Clearing
Boston Financial Data Service
Investors Fiduciary Trust Company
Portico
DST Computer Services
Pioneer Western (wholly owned by Kansas City Southern Industries, Inc.)
Pabtex, Inc. (wholly owned by Kansas City Southern Industries, Inc.)
Rice-Carden Corporation (wholly owned by Kansas City Southern Industries, Inc.)
Mid-America Television Company (wholly owned by Kansas City Southern Industries, Inc.)
The American-Coleman Company (wholly owned by Kansas City Southern Industries, Inc.)
Rycom Instruments, Inc.
Lonestar-KC Concrete Tie Company
LDX Group, Inc. (74% owned by Kansas City Southern Industries, Inc.)

The Missouri-Kansas-Texas Railroad Company is the wholly owned subsidiary of its parent Katy Industries, Inc.

Office - Supreme Court, U.S.
FILED
MAY 30 1984
ALEXANDER L. STEVAS
CLERK

No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF OF PETITIONERS CALLING ATTENTION TO NEW CASE

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SUPPLEMENTAL BRIEF OF PETITIONERS CALLING ATTENTION TO NEW CASE

Pursuant to Rule 24.5 of the Rules of this Court, Petitioners submit the following supplemental brief to call this Court's attention to a new case, decided subsequent to the time of Petitioners' last filing, in which a United States District Court in the Eighth Circuit has followed the Tenth Circuit's decision. The case is styled:

> **Burlington Northern Railroad Company v. Bair, Civ. No. 83-100-A (S.D. Iowa, May 25, 1984, reprinted in Appendix A.)**[1]

In the case, Burlington Northern Railroad Company, one of the Petitioners herein, filed an action in the Southern District of Iowa alleging that the State of Iowa had violated Section 306. One of plaintiff's contentions was that in each of the tax years 1981 and 1982, the State of Iowa had assessed all of plaintiff's property in Iowa at a level exceeding its true market value by 90% and 48%, respectively, and that such overvaluation constituted unlawful discrimination against plaintiff in violation of Section 306. On May 25, 1984, the court issued its order dismissing plaintiff's claim under Section 306 for relief from discrimination resulting from the valuation of plaintiff's property at more than its true market value. The district court's ruling is based entirely upon the erroneous standard of proof enunciated by the Tenth Circuit in *Lennen*, as is shown by the following quotation from the district court's order:

> "When plaintiff claims that its properties are valued for ad valorem tax purposes at more than true market value, it must make a 'strong showing of

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[1] The initial opinion entered therein, *Burlington Northern R.R. v. Bair*, Civ. No. 83-100-A (S.D. Iowa April 20, 1984), is cited on page 6 of "Petitioners' Response to Brief for the United States as Amicus Curiae" and reprinted in App. A thereto.

> purposeful overvaluation' of its property 'with discriminatory intent.' *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). The record in this action fails to show either a purposeful overvaluation or a discriminatory intent."

Petitioners call the case to this Court's attention as further evidence of the need for this Court to grant the writ in this case and to provide a definitive decision on this important question of national transportation policy. Petitioners believe that a denial of the writ can lead only to a further spreading to other circuits of the decision of the Tenth Circuit, which Petitioners and the United States both assert to be erroneous. Petitioners again submit that the case now properly before this Court offers the best, and perhaps the only, opportunity to decide the issue correctly and to protect the national transportation system from the grievious consequences of *Lennen*.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-100-A

THE BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

FILED
May 25 1984
3:00 PM
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

ORDER

On April 20, 1984, the Court issued a Ruling and Order enjoining defendant from excluding fifty-percent of the unit value of plaintiff's property from the tax benefits to which owners of personal property are entitled under the rollback and exemption provisions of Iowa Code sections 427A.33, .2, and .9. At that time the Court indicated that the second issue, involving the claim that the plaintiff's property was valued at a level well-above its true market value, was complex and would require more time to consider, and a second ruling would be entered resolving that issue.

The Court has now determined that plaintiff has failed to establish a separate cause of action for overvaluation under Section 306 of the Railroad Revitalization and Regulatory Re-

form Act of 1976, Pub. L. 94-210, Section 306, 90 Stat. 31, 54-55, 94th Cong. 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 180-81 [hereinafter "Section 306"], and a detailed discussion of the evidence and law is not appropriate at this time.

When plaintiff claims that its properties are valued for ad valorem tax purposes at more than true market value, it must make a "strong showing of a purposeful overvaluation" of its property "with discriminatory intent." *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). The record in this action fails to show either a purposeful overvaluation or a discriminatory intent.

This does not mean, however, that plaintiff's evidence concerning defendant's appraisal of plaintiff's Iowa transportation property is not relevant to the issue involved in plaintiff's severed third claim. The record made thus far can and will be considered by the Court for whatever bearing it may* on the comparative ratios of assessment to true market value of transportation and all other commercial and industrial properties.

IT IS THEREFORE ORDERED that plaintiff's claim under Section* for valuing its property at more than its true market value shall be and hereby is dismissed.

Signed this 25th Day of May, 1984.

W. C. Stuart

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

*So in original

Office - Supreme Court, U.S.
FILED
DEC 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-802

In the Supreme Court of the United States

October Term, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a Subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Petitioners*,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an Administrative Agency of the State of Kansas, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does 49 U.S.C. §11503 compel a district court of the United States to grant injunctive protection to a rail transportation property owner based merely on an unproven claim of overvaluation for ad valorem taxation?

PARTIES

The parties to this case are accurately listed in the Petition.

TABLE OF CONTENTS

Counterstatement of Questions Presented	I
List of Parties to This Proceeding	I
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Summary of Reasons for Denying the Writ	8
Argument in Support of Reasons Why the Writ Should Be Denied	9
Conclusion	17

TABLE OF AUTHORITIES

Cases

Atchison, Topeka & Santa Fe Railway Co. v. Lennen, 552 F.Supp. 1031 (D.Kan. 1982) 4
Burlington Northern Railroad Co. v. Lennen, 715 F.2d 494 (10th Cir. 1983) 2, 7, 13
Dows v. City of Chicago, 11 Wall. 108 (1871) 13
Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) 14
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 14
Heine v. The Board of Levee Commissioners, 19 Wall. 655 (1874) 16
Moses Lake Homes v. Grant County, 365 U.S. 744 (1961) 16
Perez v. Ledesma, 401 U.S. 82 (1971) 14
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 14
Symns v. Graves, 65 Kan. 628, 70 P. 591 (1902) 16
State Railroad Tax Cases, 92 U.S. 575 (1876) 16
Wayman v. Southard, 10 Wheat. 1 (1825) 16
United States v. Johnston, 268 U.S. 220 (1925) 10

Statutory Provisions Cited

28 U.S.C. §1341 ..... 7, 13, 15
49 U.S.C. §11503, recodification of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Rule L No. 94-210, 90 Stat. 54 (February 5, 1976) ..... passim

No. 83-802

In the Supreme Court of the United States

October Term, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a Subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Petitioners*,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an Administrative Agency of the State of Kansas, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, a copy of which is contained in

Appendix A of the Petition, was filed August 25, 1983, and is reported at 715 F.2d 494. The opinion of the United States District Court for the District of Kansas, a copy of which is contained in Appendix B of the petition, was filed on December 9, 1982, and is unreported. The district court's order denying the preliminary injunction requested by petitioners, a copy of which is contained in Appendix C of the Petition, was dated December 1, 1982, and is unreported.

JURISDICTION

The jurisdictional statement contained in the petition is adequate.

STATUTORY PROVISIONS INVOLVED

Public Law 94-210 of the 94th Congress, 90 Stat. 54 (1976), commonly called the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), was enacted on February 5, 1976. Section 306 of that Act prohibits the assessment by a state for ad valorem tax purposes of rail transportation property at a higher ratio of the assessed value to the true market value of such rail transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property. Section 306 was originally codified at 49 U.S.C. §26c. In October, 1978, §26c was repealed and recodified at 49 U.S.C. §11503.[1]

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[1] Hereinafter referred to as either "49 U.S.C. §11503" or "§11503".

STATEMENT OF THE CASE

The petitioners seek a review of the Tenth Circuit's opinion affirming the order of the district court which had denied a preliminary injunction. In the district court, the petitioners sought a preliminary injunction preventing the respondents from collecting ad valorem taxes based upon valuations which they claimed were excessive.

On July 9, 1982, the eleven interstate Railroads doing business in Kansas commenced two actions in the United States District Court for the District of Kansas. In Case No. 82-1561, the Petitioners here[2] (hereinafter called the "BN Railroads") sued the Kansas Department of Revenue and two of its administrative officers (hereinafter "State") alleging that the State had violated 49 U.S.C. §11503 in two respects: (1) The BN Railroads alleged that the State was assessing rail transportation property at a higher ratio of its true market value than commercial and industrial property's assessed value bore to its true market value (hereinafter called "equalization claim") and (2) the State had valued their rail transportation property at a value which exceeded its true market value (hereinafter called "valuation claim"). In Case No. 82-1562, the remaining five railroads,[3] not parties herein, plead an equalization claim only.

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2. The Appellants herein are listed as the Burlington Northern Railroad Company, Missouri Pacific Railroad Company, The Kansas City Southern Railway Company, The Kansas and Missouri Railway and Terminal Company, Union Pacific Railroad Company and The Missouri-Kansas-Texas Railroad Company. It should be noted that The Kansas and Missouri Railway and Terminal Company did not seek valuation relief at the hearing on the preliminary injunction. Pet.App.B at p. 11a.

3. The five interstate railroads who admitted that the values determined by the State were their true market values were The

(Continued on following page)

In November, 1982, the BN Railroads moved the district court for a preliminary injunction to restrain the State from collecting that portion of the first half ad valorem taxes which they claimed violated 49 U.S.C. §11503. Since the issues in the equalization portion of the actions had been fully tried in a prior tax year and were on appeal to the Tenth Circuit Court of Appeals, the State and the Railroads in both cases stipulated that the equalization relief accorded the Railroads would be in keeping with the methodology used in the prior action.[4] Pursuant to the stipulation, the statutory level of assessment of 30 percent of fair market value was reduced to 11.7 percent, the stipulated level of assessment of commercial and industrial real estate only; the relief accorded under the equalization claim enjoined the State from levying and/or collecting 61 percent of the Railroads' first half ad valorem taxes. The evidentiary hearing on the motion for a preliminary injunction related only to the valuation claim of six of the eleven railroads.

The hearing on the preliminary injunction lasted three days. The BN Railroads relied on a hired consultant for their opinions and estimates of value. The State called as its witnesses the Director of Property Valuation and

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Footnote continued—

Atchison, Topeka & Santa Fe Railway Company, Chicago & Northwestern Transportation Company, Chicago, Rock Island & Pacific Railroad Company, Kansas City Terminal Railway Company, and St. Louis Southwestern Railway Company.

4. The 1980 4-R Case, reported at 552 F.Supp 1031 (1982), involved only an equalization issue since all eleven Railroads in that case admitted their Kansas values were their true market values. The stipulation of the parties in the instant case recognized that appeals had been taken from the final order in the 1980 case (Case Numbers on Appeal 82-1873, 82-1878 and 82-1981), that the district court, if it equalized in 1982, would follow the methodology employed in the 1980 case, and that utilization of such methodology under the stipulation would not prejudice anyone's position in the case on appeal.

two appraisers with the Public Service Bureau of the Department of Revenue.

Both sides agreed that a system value for the Railroads was the proper means of arriving at value and both utilized the same general methodology in arriving at the estimated value. The BN Railroads' appraiser quibbled with some of the factors in the procedures used by the State in arriving at the State's determinations of value. The BN Railroads' appraiser, however, admitted that he had previously testified in the 1980 4-R case before the same court that Kansas followed a particularly consistent approach to value and that the values achieved by the procedures used by the State were reasonable. The witnesses for the State testified that the factors questioned by the BN Railroads had been utilized in Kansas since 1971 and established that the procedures used to value the BN Railroads were identical to those used to value the other five interstate Railroads as well as 230-plus state assessed public utilities.[5] The procedures used to arrive at the estimates of value were described to the court in great detail and the reasons for the increases in value were demonstrated by the State.

The evidence presented at the hearing in the district court included the following:

1. The Burlington Northern admitted that for the 1982 tax year the State of California valued its property at $3,522,747,000, the State of Idaho valued its property at $3,000,000,000, and the State of Oklahoma valued its property at $3,574,921,544, all substantially

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5. Of the six Railroads who challenged their valuations, five of the Railroads' estimates of value increased and one decreased from 1981 to 1982; of the five Railroads who admitted their valuations, all five of the Railroads' estimates of value increased from 1981 to 1982.

higher than the $2,300,000,000 which Kansas determined.

2. The Missouri-Kansas-Texas admitted that for the 1982 tax year the State of Missouri valued its property at $200,000,000, and the State of Oklahoma valued its property at $208,608,050, both substantially higher than the $160,000,000 which Kansas determined.

3. The Missouri Pacific admitted that for the 1982 tax year, the State of Oklahoma valued its property at $1,748,293,455, and the State of Tennessee valued its property at $1,700,000,000, both substantially higher than the $1,550,000,000 which Kansas determined.

4. The Union Pacific admitted that for the 1982 tax year the State of California valued its property at $2,569,000,000, and the State of Montana valued its property at $2,723,190,000, both substantially higher than the $2,300,000,000 which Kansas determined.

5. The Kansas City Southern admitted that its home state of Missouri had valued its property at $175,000,000, which was precisely the same amount which Kansas determined.

After hearing all the evidence, the district court found that the BN Railroads had failed to demonstrate reasonable cause to believe that the State had overvalued the property in question in 1982. The district court also held that Congress, in enacting 49 U.S.C. §11503, did not generally intend for federal courts to become involved in the valuation process. The district court *sua sponte* held that the BN Railroads had failed to demonstrate any retaliation by the State in the 1982 valuations of the Railroads. Finding the BN Railroads' opinion testimony wholly inadequate to sustain their burden of proof, the district court on

December 1, 1982, tersely denied the request for a preliminary injunction on the valuation claim. (Pet.App.C) On December 9, 1982, the district court augmented its December 1 order by filing a detailed memorandum decision. (Pet.App.B) The BN Railroads appealed to the Tenth Circuit Court of Appeals from both the December 1 Order and the December 9 Memorandum.

The Tenth Circuit heard the matter on May 19, 1983, and rendered its decision affirming the district court on August 25, 1983. 715 F.2d 494 (10th Cir. 1983).

On appeal, the Tenth Circuit affirmed the district court's denial of the preliminary injunction, stating that an examination of the record disclosed that the BN Railroads had failed to make a showing of discriminatory overvaluation. After carefully noting it had examined "every item of legislative history cited by the district court and . . . by the parties," the Tenth Circuit declared that the district court's opinion fairly recited the legislative history of Section 306 which "militated" against the position of the BN Railroads. Pet.App.A at 5a. The court of appeals concurred with the district court's finding that equalization, not valuation relief, was the purpose of the legislation. The Tenth Circuit also concluded that nothing in the language of Section 306 or in the legislative history suggested "that Congress intended the railroads to escape the general noninterference rule of [28 U.S.C.] §1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." Pet.App.A at 6a. The Tenth Circuit rejected the notion that Congress intended the federal district courts to sit as state tax assessment boards for railroad property, recognizing that such a rule would impose significant bur-

dens on district courts and would substantially thwart the tax collection process of states and their subdivisions.

The BN Railroads sought a rehearing with a suggestion in banc which was summarily rejected by the Tenth Circuit on October 13, 1983. The Tenth Circuit, however, stayed its mandate until November 14, 1983, so that the BN Railroads could file a petition for writ of certiorari with this Court.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

The petition for writ of certiorari should be denied because this Court is being asked to render an advisory opinion on an issue raised for the first time on appeal in this Court in an action where federal jurisdiction is lacking.

ARGUMENT IN SUPPORT OF REASONS FOR DENYING THE WRIT

1. The Issue Presented for Review by the BN Railroads Is a Request for an Advisory Opinion Because Its Determination Will Have No Effect Upon the Ultimate Outcome of the Action Below.

During the evidentiary hearing on the preliminary injunction in the district court, the BN Railroads represented to the court that: "The proof which the railroads plan to offer at the hearing in this case concerning railroad valuation will be the same proof that will be offered at the trial on the merits." Thus, the district court heard *all* the BN Railroads' evidence on the valuation issue. After hearing all the evidence, the district court found that that evidence failed to show that the State had overvalued the BN Railroads' property in 1982. On appeal, the Tenth Circuit reexamined the evidentiary record and also concluded that the BN Railroads failed to make a showing of overvaluation. The BN Railroads have not requested this Court to review this evidentiary record in any manner or fashion. Since both the district court and the court of appeals based their decisions upon the particular facts contained in that evidentiary record, which are unchallenged herein, it necessarily follows that the determination of the "issue" presented by the BN Railroads would have absolutely no effect upon the outcome of the case.

In their pleadings, the BN Railroads did not allege any impropriety whatsoever in the Kansas appraisal process by which their valuations were determined in 1982; they simply alleged that the valuations were too high. They pleaded their case and presented their evidence in

reliance upon a false and arrogant premise, namely, that, for the purpose of considering the request for a preliminary injunction, the district court was required to accept *their* witness' appraisal opinion of the market value of the Railroads' property. Every allegation in the Railroads' complaint filed in the district court and every statement in their motion for preliminary injunction presupposed the conclusiveness of the valuation numbers proffered by the BN Railroads' own hired appraiser. The BN Railroads asked the district court to grant them preliminary injunctive relief based upon their unilateral allegations of value. The district court heard all the evidence the BN Railroads offered. After hearing this evidence, the district court made a specific finding that that evidence was insufficient to show overvaluation. On appeal, the Tenth Circuit agreed with this finding.

The instant petition does not seek review of the evidentiary findings made by the district court and affirmed by the Tenth Circuit. Once again, the petition presupposes the correctness of the testimony of the BN Railroads' hired appraiser and ignores the totality of the factual record below and the findings of fact by the district court and court of appeals. If this Court grants the writ and entertains the "question" presented by the petition, any opinion rendered by this Court will be advisory only, since the factual findings below remain unchallenged.[6] The decisions below are supported by a substantial factual record. Determination of the theoretical "issue" presented by the BN Railroads will not affect the outcome of this particular case. It cannot support the issuance of a writ of certiorari.

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6. The BN Railroads apparently accept as correct the learned pronouncement of Mr. Justice Holmes in *United States v. Johnston*, 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

2. The "Questions Presented for Review" Are Being Raised for the First Time and Are Inadequate to Provide a Foundation for Issuance of a Writ of Certiorari.

The question presented by the BN Railroads to this Court as the basis for review deals with their burden of proving "purposeful overvaluation of their property . . . and discriminatory intent . . ." in order to secure the protection of a preliminary injunction from alleged overvaluation for ad valorem tax purposes. This question is presented for the first time to this Court, and cannot justify the issuance of a writ of certiorari.

In the trial court, the BN Railroads presented what was a simple valuation case. They claimed Kansas had improperly determined the fair market value of their rail transportation property; they sought a preliminary injunction from alleged overvaluations. They were denied relief on the "valuation" issue.

At the Tenth Circuit, the BN Railroads argued that the district court had erred in failing to apply the "federal standard" of valuation, which they claimed was set forth in 49 U.S.C. §11503. As the State pointed out in its brief below, "(i)f this was the position the Railroads took in the district court, they were entirely successful in concealing this position from the Court and from the defendants."

Now the Questions Presented for Review in the petition for a writ have once again changed; the issues offered this Court were not raised in the courts below. This Court needs no citation to its own decisions which hold that a question raised for the first time in a petition for certiorari to this Court will not justify issuance of the writ.

The BN Railroads' apparent difficulty in crafting the question presented for review to the appellate courts flows

from a basic flaw in this case: it simply is not ripe. The BN Railroads correctly acknowledge in their petition that this appeal is from the denial of a preliminary injunction. (Pet. p.17 n.22) While they claim that this case involves a "clear-cut issue of law that is fundamental to the further conduct of the case", they have yet to articulate the "clear-cut issue" and completely ignore the fact that the issuance of certiorari in this case would have no effect on the further conduct of *this* case.

The BN Railroads seek a ratification from this Court of their interpretation of the 4-R Act. In their haste, they have sought this Court's attention before the issues are fully tried. This haste prevents the BN Railroads from properly crafting issues for review. The failure of the BN Railroads to state proper questions for review consistently is symptomatic of the inappropriate and unripe posture of this case. The "Questions Presented for Review" are being raised for the first time and should not be considered by this Court until and unless the trial court and the Tenth Circuit have had ample opportunity to deal with *these* questions. For this reason, if for none of the others advanced in this Brief in Opposition, certiorari should be denied.

3. The "Issue" Presented by the BN Railroads Presupposes a Congressional Intent to Grant Jurisdiction and a Valid Constitutional Basis for It, Both of Which Are Lacking in This Matter.

A. The Court Below Correctly Found That Congress Did Not Intend to Grant Jurisdiction to Federal Courts to Determine Valuation Questions.

Both the district court and the Tenth Circuit closely examined the legislative history of 49 U.S.C. §11503. Both concluded that in enacting this legislation, Congress did not

intend that the railroads could escape the general noninterference rule of the Tax Anti-Injunction Act, 28 U.S.C. §1341, to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of the railroad property. 715 F.2d at 498. 49 U.S.C. §11503 can only be properly interpreted in the light of the long-standing policy of noninterference by the federal judiciary in state taxation matters.

This Court, in a long line of cases, has emphasized the importance of the policy of noninterference by the federal judiciary in matters of state taxation. In *Dows v. City of Chicago*, 11 Wall. 108 (1871), this Court proclaimed:

> "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Id.* at 110.

More recently, Mr. Justice Brennan reiterated the special reasons underlying the policy of noninterference:

> "The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax ad-

ministration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency." *Perez v. Ledesma*, 401 U.S. 82, 128, at n.17 (1971).

In *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), this Court reaffirmed its commitment to the traditional policy of federal noninterference, noting that the compelling nature of the reasons supporting this policy is underscored by the dependence of state budgets on the receipt of local tax revenue. *See also, Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

The legislative history of §306 clearly indicates that Congress was well aware not only of the general proscription on federal interference with matters of state taxation but also of the complexities of the ad valorem process. *See* Pet.App.B at pp. 24a and 18a respectively. Both the district court and the Tenth Circuit were unwilling to infer that §306 was enacted as a blanket exception to the long-standing policy of noninterference with matters of state taxation. Both courts concluded that Congress would have provided a specific directive had it intended to involve the federal courts in the intricacies of the valuation of interstate railroads. Even if the conclusions of the lower courts were in error as to the intentions of Congress, the fact remains that the district court *did* examine *all* the evidence offered by the BN Railroads at the hearing and found it was insufficient to support their claim of overvaluation. Pet.App.C at p. 32a. Both the district court and the Tenth Circuit concluded that Congress did not in-

tend for 49 U.S.C. §11503 to lift the traditional bar of comity and 28 U.S.C. §1341's jurisdictional ban for every imagined cause of action arising from matters of state taxation. The jurisdictional conclusions of the lower courts were dicta only because they heard the evidence and decided the case on the merits. Determination of the abstract jurisdictional "question" will not cure the insufficiencies in the BN Railroads' evidence or change the result below. As such, this "issue" is insufficient to support the issuance of a writ of certiorari.

B. The "Issue" Presented by the BN Railroads Presupposes a Valid Constitutional Basis for Jurisdiction.

The BN Railroads, in their "Questions Presented for Review" have presumed that the Constitution of the United States provides the authority for a federal district court to determine valuations for ad valorem taxation purposes. Such a presumption rests upon a misperception of the powers of the judiciary.

In their statement of the reasons for granting the writ, the BN Railroads have speculated that unless the federal courts assert jurisdiction over the railroads' valuations, the objectives of the 4-R Act will be "negated". Therefore, they assert that the federal court should: (1) determine the value of the railroads under 49 U.S.C. §11503, (2) compare the courts' values with those determined by the State and (3) substitute the courts' values for those of the State. Although the BN Railroads have articulated meretricious speculation and conjecture to support such an exercise of jurisdiction, they are strangely silent as to the basis upon which that jurisdiction might rest. That silence is due, in part, to the fact that the Constitution of the United States prohibits such a grant of power.

This Court has long recognized that the power of taxation is a power belonging to the legislative branch of government. *Heine v. The Board of Levee Commissioners*, 19 Wall. 655 (1874). While the legislative branch may exercise the power of taxation by establishing administrative agencies and empowering officers to administer the same, the separation of powers doctrine simply prohibits the judiciary from interfering with or substituting their judgment for those of the administrative officers. *State Railroad Tax Cases*, 92 U.S. 575 (1876); *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961). Moreover, Congress, in enacting 49 U.S.C. §11503, lacked the authority to delegate the power of taxation and to empower the judiciary to act in a nonjudicial manner. *Wayman v. Southard*, 10 Wheat. 1 (1825); *Symns v. Graves*, 65 Kan. 628, 70 P. 591 (1902).

Under the guise of "discrimination", the BN Railroads are urging this Court to grant a writ of certiorari to allow review of issues which, if decided in the petitioners' favor, would render 49 U.S.C. §11503 unconstitutional. Such cannot possibly support the issuance of the writ of certiorari.

CONCLUSION

The 4-R Act, 49 U.S.C. §11503, was enacted, in part, to correct discriminatory tax treatment of railroads. Its purpose was not to *absolve* them from ad valorem taxation altogether. The BN Railroads have argued that unless federal courts determine valuations for ad valorem tax purposes the objectives of the Act will be negated. In Kansas, the BN Railroads received an abatement of 61 percent of their 1982 ad valorem tax liability under the equalization claim. Now they seek treatment which would make them preferred taxpayers and would perhaps absolve them from *any* ad valorem tax liability whatsoever. Under the guise of discrimination, they seek a "favored status" under the law. They provide no bases for the relief they seek; they ignore the factual record below which demonstrates that they failed to prove their case by competent evidence. The reasons advanced for granting the writ are speculative and conjectural.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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No. 83-802

In the Supreme Court of the United States

October Term, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY.

Petitioners,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

COUNTY RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

No legal question is presented for review by the petition for writ of certiorari. The questions proposed in the petition for writ did not form any part of the decisional bases of the opinion of the United States Court of Appeals for the Tenth Circuit nor of the opinion of the United States District Court for the District of Kansas (Hon. Richard D. Roger). That decisional bases, instead, consisted wholly of factual determinations made after hearing and upon conflicting evidence, and which are applicable to only some Kansas railroads and to only the 1982 Kansas 4-R Act case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
TABLE OF AUTHORITIES III
STATEMENT OF CASE 2
REASONS FOR DENYING CERTIORARI 8

1. The Decisional Bases For The Tenth Circuit's Opinion Were Factual Determinations Applicable Only To Certain Railroads And To This Specific Case 8
2. The Railroads Have Adequate State Law Tax Remedies Available For Relief From Overvaluation. They Have Never Used Them 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Berenyi v. Immigration Director, (1967) 385 U.S. 630, 635, 17 L.Ed.2d 656, 87 S.Ct. 666 10
Board of County Commissioners v. Brookover, (1967) 198 Kan. 70, 422 P.2d 906 12
Builders, Inc. v. Board of County Commissioners, (1963) 191 Kan. 379, 381 P.2d 527 12
Dick v. New York Life Ins. Co., (1959) 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 10
Garvey Grain, Inc. v. MacDonald, (1969) 203 Kan. 1, 453 P.2d 59 12
Graver Mfg. Co. v. Linde Co., (1948) 336 U.S. 271, 275, 93 L.Ed. 672, 69 S.Ct. 535 10

Hanzlick v. Republic County Comm'rs, (1939) 149 Kan. 667, 88 P.2d 1111 12
Layne & Bowler Corp. v. Western Well Works, (1922) 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422 10
Mobil Oil Corporation v. McHenry, (1969) 200 Kan. 212, 227-232, 436 P.2d 982 12
Mobil Pipeline Co. v. Rohmiller, (1974) 214 Kan. 905, 522 P.2d 923 12
Moses Lake Homes v. Grant County, (1961) 365 U.S. 744, 6 L.Ed.2d 66, 71, 81 S.Ct. 870 12
Rice v. Sioux City Cemetery, (1954) 349 U.S. 70, 74, 79, 99 L.Ed. 897, 75 S.Ct. 614 10
Symns v. Graves, (1902) 65 Kan. 628, 70 Pac. 591 12
United States v. Johnston, (1924) 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496 10

Statutory Provision Cited

Federal

49 U.S.C. § 11503 Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ..... *passim*

State

Kansas Statutes Annotated (K.S.A.) 74-2426 11
K.S.A. 79-5a01 11
K.S.A. 79-5a05 11
K.S.A. 79-2005 11
K.S.A. 79-2426(e) 11
K.S.A. 79-2438 11
K.S.A. 1982 Supp. 79-5a01 11
K.S.A. 1982 Supp. 79-2005 11

No. 83-802

In the Supreme Court of the United States

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BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

COUNTY RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The County Respondents file this brief in opposition to the petition for writ of certiorari filed by certain railroads from what is hereinafter defined as the Burlington Northern group of Kansas railroads. The County Respondents, having been the County Intervenors below, are the following counties of the State of Kansas: Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt.

STATEMENT OF CASE

This case concerns the amount of Petitioners' liability to the State of Kansas for ad valorem taxes for 1982 as that amount may be affected by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), codified at 49 U.S.C. § 11503.

Petitioners are five[1] of the eleven railroads which are subject to Kansas ad valorem taxes for 1982.

By two separate actions filed in the United States District Court for the District of Kansas, all of the eleven railroads operating in Kansas sought tax relief under Section 306 of the 4-R Act. Similar cases were filed by the railroads concerning their 1980 and 1981 taxes.

The 1982 suit filed by the Santa Fe group[2] of Kansas railroads sought *equalization* relief under Section 306 of the 4-R Act. Those railways contended that the State Respondents[3] had assessed their property in 1982 at a ratio

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1. At page ii of their petition for writ, Petitioners state "Petitioners . . . are listed in the caption". The caption includes The Kansas and Missouri Railway and Terminal Company. At page 9 of the petition for writ, the listing of "each of the petitioning railroads" excludes the Terminal Company. The District Court's opinion footnoted the fact that the Terminal Company "did not wish to be included with the other railroads seeking a preliminary injunction on the valuation issue". (Petition for Writ, p. 11a). Accordingly, the County Respondents do not consider the Terminal Company to be a Petitioner; they consider only those railroads listed at page 9 of the petition for writ to be Petitioners.

2. The Santa Fe group of railroads consists of: Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Transportation Company; Chicago, Rock Island and Pacific Company; Kansas City Terminal Railway Company; and St. Louis Southwestern Railway Company.

3. C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas; Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and The Department of Revenue of The State of Kansas, an administrative agency of the State of Kansas.

of assessed-value-to-true-value (i.e.: 30 percent) which was higher than the ratio on other commercial and industrial property within the State of Kansas (i.e.: 11.7 percent). The Santa Fe group sought an order prohibiting the State Respondents and the County Respondents from assessing or taking any action to collect 1982 taxes based on assessments of the railroads' properties at an assessment ratio higher than 11.7 percent.

The claims made by the Santa Fe group in their 1982 case were identical to the claims made by all eleven Kansas railroads in their respective Kansas 4-R Act suits for 1980 and 1981.

The 1982 suit filed by the Burlington Northern group of Kansas railroads[4] (Petitioners before this Court) included the same *equalization* claims as in the Santa Fe group's case. The Burlington Northern group's suit also included *overvaluation* claims i.e.: claims that those railroads' properties had been valued at more than their actual fair market value. The tax assessments for five of the six railroads in the Burlington Northern group and for several of the railroads in the Santa Fe group had been increased in 1982 over 1980-1981 levels. The Burlington Northern group claimed that that increase resulted in an overvaluation of their properties for tax purposes, and that that increase/overvaluation had been made by the State Respondents in retaliation for the railroads' having received temporary equalization relief in their 1980 cases. The Burlington Northern group in addition sought an order prohibiting the State Respondents and the County

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4. The Burlington Northern group of railroads consists of: Burlington Northern Railroad Company; Missouri Pacific Railroad Company; Kansas City Southern Railway Company; Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company including the St. Joseph and Grand Island Railway Company; and Missouri-Kansas-Texas Railroad Company.

Respondents from assessing or taking any action to collect 1982 taxes based upon *valuations* of those railroads' properties which the Burlington Northern group considered excessive.

The Burlington Northern group's 1982 suit was the first time in the history of the Kansas 4-R Act litigation that such *overvaluation* claims have been made by any railroad.

During the period November 23-29, 1982, the District Court heard evidence in the 1982 cases on all of the railroads' motions for preliminary injunction, including all of the railroads' equalization claims and the Burlington Northern group's overvaluation claims for such relief. The witnesses who testified were: Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, a member of the staff of the Division of Property Valuation, and an expert witness for the railroads. The testimony of all three witnesses specifically addressed the Burlington Northern group's overvaluation claims.

By its December 1, 1982 order in the 1982 case, the District Court granted *equalization* relief to all of the railroads. Specifically, the District Court temporarily enjoined the State Respondents and the County Respondents from assessing or taking any action to collect 1982 taxes based on an assessment of the railroads' properties at an assessment ratio higher than 11.7 percent. All the railroads thus were allowed to pay only 39 percent of their 1982 taxes pending final disposition of the 1982 cases. This temporary equalization relief was identical (subject to minor mathematical adjustments) to the temporary relief which the District Court had granted the eleven Kansas railroads in their respective Kansas 4-R Act cases for 1980 and 1981.

By its December 1, 1982 order, the District Court denied *overvaluation* relief to the Burlington Northern group. The District Court first ruled that Section 306 of the 4-R Act did not reach overvaluation issues absent a showing of retaliatory overvaluation:

> "After carefully examining the issue of valuation, the court finds from a thorough review of the legislative history of Section 306 that Congress did not generally intend the courts to examine the issue of the valuation of the railroads in actions brought under Section 306. However, we do believe that the court has jurisdiction to consider a situation where a state attempts to circumvent Section 306 by overvaluing a railroad in retaliation for past relief accorded under Section 306 of the 4-R Act." (Petition for Writ, pp. 31a-32a)

The District Court then found that the railroads' evidence on the retaliatory overvaluation issue was insufficient to show a violation of Section 306:

> "After carefully reviewing the evidence presented in this case, we do not find that the railroads have demonstrated reasonable cause to believe that a violation of Section 306 has occurred on the issue of valuation. The railroads have failed to adequately show that any increase in the valuation of their rail transportation property was due to improper motivation by the defendants." *Id.*

On the question of overvaluation in general, the District Court found that the railroad's property had not been overvalued in any event:

> "Further, even assuming that the court could consider an ordinary overvaluation case under Section 306, we do not find that the railroads have shown that

the defendants overvalued their property under the guidelines established by Kansas law." *Id.*

In its December 9, 1982 memorandum, the District Court amplified its foregoing findings:

> "After carefully considering the evidence on overvaluation, we do not find that the plaintiffs have demonstrated reasonable cause to believe that the defendants retaliated against them for relief received in the 1980 tax case. We reach this conclusion based on several facts adduced during the evidence that was presented. The procedures used by the defendants to arrive at the 1982 unit valuations were identical to the procedures used by the defendants for over ten years to value railroads operating within the State of Kansas. Further, these procedures were identical to those used to value the other railroads within the state of Kansas in 1982. It appears that the railroads have long been dissatisfied with the procedures used by the defendants to value railroad transportation property in Kansas. The procedures utilized in 1982 certainly were not just instituted in order to create a higher value for the railroads. The court found the explanations offered by defendant Martin for the increases in the 1982 valuations of the Burlington Northern plaintiffs to be credible. In sum, we find that the plaintiffs have failed to adequately demonstrate any retaliation by the defendants in their 1982 valuations of the Burlington Northern plaintiffs. Further, even if we were to consider simply the issue of overvaluation, we do not find that the plaintiffs demonstrated reasonable cause to believe that the defendants, under the standards provided under Kansas law, overvalued the plaintiffs' property in 1982. In sum, we refuse to grant any relief to the Burlington Northern plaintiffs

based on alleged overvaluation." (Petition for Writ, pp. 26a-27a)

In its August 23, 1983 opinion, the Tenth Circuit slightly modified the District Court's legal conclusions concerning the breadth of overvaluation issues cognizable under Section 306:

> "The district court declared that it would grant relief under § 306 if the railroad could make a strong showing that state authorities deliberately overvalued the railroads' property in retaliation for past equalization relief the railroads had secured. We agree, but we would hold that a suit can be maintained whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation. We emphasize, however, that a strong prima facie case of retaliation or intentional discrimination must be made." (Petition for Writ, p. 6a)

As to the District Court's factual conclusions on the overvaluation issue in general, however, the Tenth Circuit concurred with the lower court:

> "Here, there were substantial increases in the property valuations for most of the railroads involved in this appeal between the 1981 and 1982 tax years. The trial court found, however, that the procedures the state used to arrive at the 1982 unit valuations were identical to those it used over a long prior period and identical to those used to value the properties of the other railroads in Kansas in 1982. We have examined the record and are satisfied that the railroads did not make a sufficient showing of discriminatory overvaluation." *Id.*

REASONS FOR DENYING CERTIORARI

1. The Decisional Bases For The Tenth Circuit's Opinion Were Factual Determinations Applicable Only To Certain Railroads And To This Specific Case.

2. The Railroads Have Adequate State Law Tax Remedies Available For Relief From Overvaluation. They Have Never Used Them.

1.

The decisional bases for the Tenth Circuit's opinion were factual determinations, not legal ones.

Those factual determinations were made upon facts which were unique to the 1982 Kansas 4-R Act case, and which are not typical of the facts generally presented by 4-R Act cases, as a review of the cases cited at footnote 20, page 14 of the petition for writ will show. The uniqueness of the 1982 Kansas case was (a) an increase of the tax assessments for most Kansas railroads in 1982 over 1980-1981 levels, coupled with (b) certain railroads of the Burlington Northern group's claim of retaliatory overvaluation. The likelihood of such factual pattern repeaing, at least often enough to warrant the expression of this Court's concern by granting certiorari, is remote.

The factual determinations which were the decisional bases of the Tenth Circuit's opinion were made in the first instance by the District Court. The District Court made those determinations upon a record of controverted testimony and evidence fashioned out of several days of hearing, a hearing at which valuation experts for the railroads as well as for the State Respondents testified. Petitioners were not denied an opportunity to be heard or to present their evidence on their overvaluation claims.

Petitioners were not motioned out of court before trial nor were any of their overvaluation evidence excluded during trial. Everything that Petitioners wanted to tell the District Court about their overvaluation claims was let into the record. The Tenth Circuit concurred in the District Court's factual findings.

Petitioners do not seek certiorari on those factual determinations made below. They seek certiorari only as to certain legal issues. The legal issues proposed for review did not form any part of the decisional bases of the Tenth Circuit's opinion. No legal issue which is fundamental to Section 306 nor which is significant to the general judicial administration of the 4-R Act formed any part of those decisional bases.

The threshold to any such legal issue in the context of the 1982 Kansas case was insurmountably clogged by the factual overvaluation issue. Whether Section 306 reaches "retaliatory overvaluation" situations, as the District Court held, or whether it reaches "purposeful overvaluation with discriminatory intent" situations, as the Tenth Circuit held, overvaluation must nonetheless be found in the first instance.

The District Court held that Petitioners' evidence failed to demonstrate reasonable cause to believe that the State Respondents, under the standards provided by Kansas law, had overvalued Petitioners' property in 1982. The Tenth Circuit concurred in the District Court's findings. In Rule 17 terms, the Tenth Circuit did not decide an important question of federal law which has not been, but which should be, settled by this Court. Thus, neither lower court based its opinion on any Section 306 legal issue, much less the ones proposed for certiorari. Each court was unable to reach such issue because of the factual impediment of the overvaluation issue. That this Court

would reach such legal issue on the record below is unlikely. Any ruling which this Court were to make on such legal issue would be wholly advisory.

The limited scope of this case in the context of the judicial administration of Section 306 of the 4-R Act is evidenced further by the facts that Petitioners are only five of the six Kansas railroads comprising the Burlington Northern group, all of whose 1982 tax assessments exceeded their 1980-1981 tax assessments, and that Petitioners are only five out of the eleven railroads operating in Kansas, most of whom received such assessment increases.

Legal problems warranting certiorari must be "beyond the academic or episodic". *Rice v. Sioux City Cemetery*, (1954) 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614. Such problems must be important to the public as distinguished from the particular parties involved. *Layne & Bowler Corp. v. Western Well Works*, (1922) 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422; *Rice v. Sioux City Cemetery, supra* p. 79. "We do not grant a certiorari to review evidence and discuss specific facts". *United States v. Johnston*, (1924) 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496. Certiorari is not granted in cases where ". . . all that is involved is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, (1959) 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921, Mr. Justice Frankfurter's dissent pp. 455-456. This Court does not generally grant certiorari as to factual issues where the District Court's factual findings have received the concurrence of the Court of Appeals. *Graver Mfg. Co. v. Linde Co.*, (1948) 336 U.S. 271, 275, 93 L.Ed. 672, 69 S.Ct. 535; *Berenyi v. Immigration Director*, (1967) 385 U.S. 630, 635, 17 L.Ed.2d 656, 87 S.Ct. 666. All these principles are applicable to the instant petition for writ.

2.

The railroads have adequate state law tax remedies available for relief from overvaluation. They have never used them.

Railroads in Kansas are assessed by the Department of Property Valuation ("DPV"). K.S.A. 79-5a01 and K.S.A. 1982 Supp. 79-5a01. At any time before a railroad's assessed valuation is finally determined, the railroad has the right to appear and to be heard by the DPV concerning the appraised valuation of its property. At any time before certification of the assessed valuation to the counties, the DPV may correct any valuation that will make it more just and equal. K.S.A. 79-5a05, reprinted as Appendix A hereto. If a railroad is dissatisfied with the DPV's final assessment, it can appeal to the Kansas Board of Equalization (the "BTA"). K.S.A. 79-2438, reprinted as Appendix "B" hereto. A railroad may also pay its taxes under protest and apply to the BTA for the refund of the protested portions of those taxes. K.S.A. 79-2005 and K.S.A. 1982 Supp. 79-2005, the latter being reprinted as Appendix "C" hereto.

If a railroad is dissatisfied with any final order of the BTA, it may seek relief in state court. K.S.A. 74-2425, reprinted as Appendix "D" hereto. Relief will be granted by the state court if the BTA's order is found to be unreasonable, arbitrary or capricious. K.S.A. 79-2426(e). The grant of relief on these limited grounds is consistent with and dictated by federal and state constitutional doctrines of the separation of the powers of the legislature (i.e.: the taxing authority) from those of the judiciary:

> "Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials

is or is not a valid one." *Moses Lake Homes v. Grant County,* (1961) 365 U.S. 744, 6 L.Ed.2d 66, 71, 81 S.Ct. 870.

"Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges who are not elected for that purpose with the discharge of their duties by those officers who are invested with the sole authority to make and estimate value is unwarranted by the law. The district court could not substitute its judgment for that of the board of equalization, and this court cannot impose its notion of value on either. These are fundamental principles in the law of taxation and cannot be waived aside to meet the exigencies of any particular case . . .

"But fraud, corruption and conduct so oppressive, arbitrary or capricious as to amount to fraud, will vitiate any official act, and courts have power to relieve against all consequential injuries. In every case, however, the departure from duty must be shown by the party seeking redress to fall within the well-defined limits of the powers of a court of equity." *Symns v. Graves,* (1902) 65 Kan. 628, 636, 70 Pac. 591. (Citations omitted).

See also *Garvey Grain, Inc. v. MacDonald,* (1969) 203 Kan. 1, 453 P.2d 59; *Mobil Oil Corporation v. McHenry,* (1969) 200 Kan. 212, 227-232, 436 P.2d 982; *Hanzlick v. Republic County Comm'rs,* (1939) 149 Kan. 667, 88 P.2d 1111; *Builders, Inc. v. Board of County Commissioners,* (1963) 191 Kan. 379, 381 P.2d 527; *Board of County Commissioners v. Brookover,* (1967) 198 Kan. 70, 422 P.2d 906; *Mobil Pipeline Co. v. Rohmiller,* (1974) 214 Kan. 905, 522 P.2d 923.

The railroads did not invoke any of these remedies or procedures, other than to confer with the DPV, in 1980, 1981, 1982 nor in any of the several preceding years.

CONCLUSION

The Tenth Circuit's opinion was not based upon the legal questions proposed for certiorari, nor upon the basis of any legal issue of general importance to the judicial administration of Section 306 of the 4-R Act. The decisional bases of that opinion were factual determinations made after hearing and upon conflicting evidence, and which are applicable to only some Kansas Railroads and to only the 1982 Kansas 4-R Act case. The County Respondents request that this Court deny the petition for writ.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

KSA 79-5a05

79-5a05. Same; right to hearing on appraised valuation; correction of valuation. At any time before the assessed valuation of public utility property is finally determined, the public utility shall have the right to appear and be heard by the director in the matter of the appraised valuation of that utility's property. At any time before certification of the assessed valuation to the counties, the director may correct any valuation that will make it more just and equal.

APPENDIX "B"

KSA 74-2438

74-2438. Appeals to state board; notice and hearing. An appeal may be taken to the state board of tax appeals from any finding, ruling, order, decision, or other final action on any case of the director of taxation or director of property valuation by any person aggrieved thereby. Notice of such appeal shall be filed with the secretary of the board within thirty (30) days after such finding, ruling, order, decision, or other action on a case, and a copy served upon the director concerned. The board shall fix a time and a place for hearing said appeal, and shall notify the appellant or his attorney of record at least five (5) days prior to the date of said hearing.

APPENDIX "C"

KSA 1982 Supp. 79-2005

79-2005. Protesting payment of taxes; written statement of grounds; proceedings for recovery of protested taxes; limitations; refund of protested taxes; taxing districts authorized to issue no-fund warrants; levy of taxes for payment of no-fund warrants; levy exempt from tax lid. (a) Any taxpayer, before protesting the payment of such taxpayer's taxes, shall be required, either at the time of paying such taxes, or, if the whole or part of the taxes are paid prior to December 20, no later than December 20, to file a written statement with the county treasurer, on forms approved by the director of property valuation and provided by the county treasurer, clearly stating the grounds on which the whole or any part of such taxes are protested and citing any law, statute or facts on which such taxpayer relies in protesting the whole or any part of such taxes.

(b) If the grounds of such protest shall be that the valuation or assessment of the property upon which the taxes so protested are levied is illegal or void, such statement shall further state the exact amount of valuation or assessment which the taxpayer admits to be valid and the exact portion of such taxes which is being protested.

(c) If the grounds of such protest shall be that any tax levy, or any part thereof, is illegal, such statement shall further state the exact portion of such tax which is being protested.

(d) Upon the filing of a written statement of protest, the grounds of which shall be that any tax levied, or any part thereof, is illegal, the county treasurer shall mail a copy of such protest to the governing body of the taxing district making the levy being protested.

(e) Within 30 days after filing the written statement of protest, the protesting taxpayer must file an application for refund with the state board of tax appeals, on forms approved by the state board of tax appeals and provided by the county treasurer, together with a copy of the written statement of protest.

(f) Upon receipt of the application for refund, the board shall docket the same and notify the taxpayer and the county treasurer of such fact. In addition thereto if the grounds of such protest is that the valuation or assessment of the property is illegal or void the board shall notify the county appraiser thereof.

(g) After examination of the application for refund, the board shall fix a time and place for hearing, unless waived by the interested parties in writing, and shall notify the taxpayer and the county treasurer of the time and place so fixed. The county treasurer shall then notify the clerk, secretary or presiding officer of the governing body of any taxing district affected by such application for refund, of the time and place for hearing. In addition thereto if the grounds of such protest is that the valuation or assessment of the property is illegal or void the board shall notify the county appraiser thereof.

(h) In the event of a hearing, the same shall be originally set not later than 90 days after the filing of the application with the board.

(i) When a determination is made as to the merits of an application for refund, the board shall enter its order thereon and give notice of the same to the taxpayer, county treasurer, county appraiser, county attorney, county counselor and the appropriate taxing districts, by mailing to each a certified copy of its order. The date of an order, for purposes of filing an appeal to the district court, shall be the date of certification.

(j) If a protesting taxpayer fails to file such application for refund with the board within the time limit prescribed, such protest shall become null and void and of no effect whatsoever.

(k) In the event the board orders that a refund be made and no appeal is taken from such order, the county treasurer shall, as soon thereafter as reasonably practicable, refund to the taxpayer such protested taxes from tax moneys collected but not distributed. Upon making such refund, the county treasurer shall charge the fund or funds having received such protested taxes.

(l) Whenever, by reason of the refund of taxes from any fund, it will be impossible to pay for the imperative functions of such fund for the current budget year, the governing body of the taxing district affected shall issue no-fund warrants in an amount necessary to pay such refund. Such warrants shall conform to the requirements prescribed by K.S.A. 79-2940, and amendments thereto, except they shall not bear the notation required by such section and may be issued without the approval of the state board of tax appeals. The governing body of such taxing district shall make a tax levy at the time fixed for the certification of tax levies to the county clerk next following the issuance of such warrants sufficient to pay such warrants and the interest thereon. All such tax levies shall be in addition to all other levies authorized or limited by law and the tax levy limitations imposed by article 19 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, and K.S.A. 79-5001 to 79-5016, inclusive, and amendments thereto, shall not apply to such levies.

(m) The county treasurer shall disburse to the proper funds all portions of taxes paid under protest and shall maintain a record of all portions of such taxes which are so protested and shall notify the governing body of the

taxing district levying such taxes thereof and the director of accounts and reports if any tax protested was levied by the state.

(n) This statute shall not apply to the valuation and assessment of property assessed by the director of property valuation and it shall not be necessary for any owner of state assessed property, who has an appeal pending before the board of tax appeals, to protest the payment of taxes under this statute solely for the purpose of protecting the right to a refund of taxes paid under protest should that owner be successful in that appeal.

APPENDIX "D"

KSA 74-2426

74-2426. Final orders of board; rehearings; appeals to district and appellate courts; procedure and jurisdiction. (a) Whenever the board of tax appeals shall enter its final order on any appeal or in any proceeding under the tax protest, tax grievance, tax exemption statutes or any original proceeding before the board other than the above cases said board shall make written findings of fact forming the basis of such determination and final order and such findings shall be made a part of such final order. The board shall mail a copy of its final order to all parties to the proceeding within ten days following the certification of the order. The appellant or applicant and the county appraiser shall be served by restricted mail.

(b) (1) No appeal shall be taken from a final order of the board unless the aggrieved party shall have first filed a motion for rehearing of that order with the board and the board shall have granted or denied the motion for rehearing, or thirty days shall have lapsed from the filing of that motion with the board, from which it shall

be presumed that the board has denied the motion. Any order issued by the board following a rehearing shall become the final order of the board.

(2) Within thirty days following the certification of any final order of the board, on such motion for rehearing, any aggrieved party in such appeal or proceeding may appeal to the district court of the proper county.

(3) No appeal shall be taken from any order of the board in a no-fund warrant proceeding issued pursuant to K.S.A. 12-110a, 12-1662 *et seq.*, 19-2752, 75-4361, 79-2938, 79-2939, 79-2951 and statutes of a similar character.

(4) This statute shall be exclusive in determining appeals taken from all decisions of the board of tax appeals after the effective date of this act and shall exclusively govern the procedure to be followed in taking any appeal from the board of tax appeals from and after such date.

(c) (1) Appeals shall be taken by filing, with the clerk of the district court of the proper county within thirty days of the certification of the board's order to the party, a written notice stating that the party appeals to the district court, and alleging the pertinent facts upon which such appeal is grounded. Upon filing of the notice of appeal, the clerk of the district court shall docket the cause as a civil action, and shall forthwith and without praecipe, issue summons and cause the same to be served upon all parties involved in the appeal to the board of tax appeals, in accordance with the manner now provided by law in civil cases. The appellant shall also, within ten days of the filing of the notice of appeal, request in writing that the board of tax appeals certify the record of the proceedings before the board to the district court. If a hearing was held before the board the appellant shall also

request, at the same time, that a transcript of that hearing be prepared and shall advance the costs of said transcript. Upon completion of said transcript the board of tax appeals shall certify the record and transcript of proceedings before the board to the district court in which the appeal has been filed.

(2) Jurisdiction to hear and to determine such appeals is hereby conferred upon the district courts of this state. Such an appeal shall not be heard as a trial *de novo* but shall be limited to the transcript of the board and any other public records of which the board can be held to have taken notice.

(3) Appeals may be taken from the district court to the appellate courts by any party to the appeal as in civil cases, except that neither the director of property valuation nor the director of taxation shall be required to give bond on appeal. The final decision made in such appeals may be entered as a judgment as in other civil cases for or against the party appealing.

(d) (1) Appeals from orders of the board relating to excise taxes, including, but not by way of exclusion, income taxes, and from orders relating to the taxation of legacies and successions shall be to the district court of the county in which the appellant-taxpayer resides or the county in which the estate is being administered. If the appellant does not reside in Kansas or the estate is not being administered in Kansas the appeal shall be to the district court of any county where real estate belonging to the estate is located or in Shawnee county. At the time the appeal involving excise taxes or the legacies and successions taxes is filed, the party appealing, excluding the director of taxation, shall give bond for costs in the amount of one hundred twenty-five percent of the amount of taxes assessed, or such lesser amount that shall be approved by

the district court, conditioned that appellant shall prosecute the appeal without delay and pay all costs assessed against the appellant.

(2) Appeals from orders made by the board of tax appeals relating to the valuation or assessment of property for ad valorem tax purposes or relating to the tax protest, shall be to the district court of the county in which the property is located, or if located in more than one county, then to the district court of any county in which any portiton of the property is located. Orders pertaining to state assessed property, appraised and assessed by the director of property valuation, shall be appealed to the district court of Shawnee county. In orders relating to tax exemption under K.S.A. 79-201 *et seq.* the appeal shall be filed in the district court of Shawnee county. In the event the appeal is by a party other than the director of property valuation or any taxing subdivision, and is from an order determining, approving, modifying, or equalizing the amount of valuation assessable, and of which the tax has not been paid, a bond shall be given in the amount of one hundred twenty-five percent of the amount of the taxes assessed or such lesser amount as shall be approved by the district court, conditioned that appellant shall prosecute the appeal without delay and pay all costs assessed against the appellant.

(e) No appeal may be taken to the district court from any order determining, approving, modifying, or equalizing the assessment of property for ad valorem tax purposes unless such order is unreasonable, arbitrary or capricious. Such actions shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other actions except cases of a like character, and criminal cases.

(f) The district courts of this state and its appellate courts shall have jurisdiction to hear and determine any appeals, or purported appeals, which may have been dismissed after January 1, 1980, but before the effective date of this act, from final orders of the board of tax appeals concerning tax protests, tax grievances tax exemption statutes or original proceedings before the board under the provisions of K.S.A. 1980 Supp. 60-2101, subsections (a), (b) and (d), or any of their statutory predecessors, under the provisions of K.S.A. 74-2426, or any of its statutory predecessors, or under the provisions of K.S.A. 1980 Supp. 79-2005, or any of its statutory predecessors. Such jurisdiction shall be exercised by the courts in all cases where such appeals, or purported appeals, have not been finally disposed of either (1) upon the merits thereof or, (2) for lack of substantial compliance with the requirements for appeal under the statutes mentioned above or (3) upon some grounds other than the dismissal thereof on the basis of the purported lack of any appellate jurisdiction over such appeal. Any appeal or purported appeal from such final order of the board under any of the statutes mentioned above which may have been dismissed, or which may hereafter be dismissed, by a district court or appellate court on the basis that the statutes mentioned above, or any of them, did not apply to such appeal, shall be reinstated before such court immediately upon the request of any party to such appeal, and the courts shall thereafter exercise further appellate jurisdiction over such appeal in the same manner and to the same extent as if such appeal had not been dismissed.

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No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
1. Reply To The Respondents' Argument That This Case Presents A "Request For An Advisory Opinion."	1
2. Reply To The State Respondents' Contention That The Question Presented For Review Is Being Raised For The First Time	2
3. Reply To The Respondents' Arguments Based Upon Congressional Intent	3
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	Page
Aloha Airlines, Inc. v. *Director of Taxation of Hawaii*, 104 U.S. 291 (1983)	3, 5
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980)	3
STATUTES:	
49 U.S.C. § 1513(a)	4
49 U.S.C. § 11503 ("Section 306")	*passim*

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Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of the Rules of this Court, Petitioners submit the following reply to the briefs filed by the State Respondents and County Respondents:

1. Reply To The Respondents' Argument That This Case Presents A "Request For An Advisory Opinion."

The State and County Respondents contend that this Court's determination of the legal issue raised by the Petition will have no effect upon the outcome of this case.

They argue that the district court resolved all factual issues against the railroads, that the district court's factual findings are unassailable, and that the railroads cannot, therefore, prevail on the merits.[1] This argument is nonsense.

The district court's findings of fact are based upon the erroneous premise that Section 306(1)(a) requires proof of retaliation.[2] Similarily, the court of appeals' conclusions are based upon the different, but equally erroneous, premise that Section 306(1)(a) requires proof of intentional discrimination. Neither court determined whether Section 306—as it is written and without regard to the motivation on intent of state officials—has been violated. The railroads contend that the express language of Section 306 entitles them to such an interpretation.

2. Reply To The State Respondents' Contention That The Question Presented For Review Is Being Raised For The First Time.

The State Respondents assert that the railroads have raised the question presented for review for the first time in their petition.[3] This argument is completely disingenuous.

Throughout these proceedings, the railroads have consistently maintained that they have an unqualified right under Section 306(1)(a) to obtain relief from a discriminatory state assessment, regardless of whether that discriminatory assessment is achieved by overvaluation of rail transportation property, by the underassessment of

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[1] State Respondents' Brief, p. 9-10.

[2] The district Court's observation that the railroads had failed to prove overvaluation of their property *under Kansas law* is irrevelant.

[3] State Respondents, p. 11.

locally-assessed commercial and industrial property, or by a combination of both factors. It is not, therefore, the railroads who have vacillated in their interpretation of Section 306 or in their statement of the issues involved in this case. It is, rather, the district court and the court of appeals who have refused to apply Section 306(1)(a) as it is written and who have given conflicting reasons for their refusal to do so. Indeed, it is the differing interpretations given to Section 306(1)(a) by the courts in this case which warrant the grant of certiorari.

3. Reply To The Respondents' Arguments Based Upon Congressional Intent.

Throughout these proceedings the railroads have relied upon the plain language of Section 306(1)(a) to justify their right to federal relief from discriminatory overvaluation. By contrast, the district court and the Tenth Circuit have relied upon the legislative history of Section 306 to support an interpretation of the act which is at odds with the plain language of the statute. In their response to the railroads' petition, the State and County respondents have also relied upon citations to the legislative history of Section 306 to support their contention that the court of appeals' decision is correct and that certiorari should be denied.[4] Under the circumstances of this case, however, such reliance upon legislative history is misplaced.

Where statutory language is clear and unambiguous, as is the language of Section 306(1)(a), Congress' intentions must be divined from the words of the statute, not from its legislative history. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). In *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 104 U.S. 291 (1983), the Supreme

[4] State's Respondents' Brief, p. 12.

Court of the State of Hawaii sought to avoid the preemption by 49 U.S.C. § 1513(a) of a state gross receipts tax on airlines. (49 U.S.C. § 1513(a) forbade states from imposing any tax, fee, or head charge on persons traveling by air in interstate commerce.) The Hawaii Supreme Court attempted to avoid the conflict between Hawaii law and 49 U.S.C. § 1513(a) by ignoring the plain language of the federal act and by interpreting its provisions according to the putative legislative history of the act. This Court rejected that approach and stated:

> [W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.

104 U.S. at 294-95.

The plain language of Section 306(1)(a) unambiguously requires a mathematical equivalence between two assessment ratios, one of which cannot be determined without ascertaining the true market value of rail transportation property. The plain language of Section 306(1)(a) entitles railroads to establish that a discriminatory assessment ratio has resulted from the overvaluation of railroad property. Respondents' efforts to divine a contrary meaning from the legislative history are, therefore, inappropriate.[5]

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[5] The State Respondents' interjection of constitutional questions at this stage of the proceedings is also inappropriate. No allegations of unconstitutionality were raised below. At the hearing on the preliminary injunction, the Respondents limited their legal arguments to whether the district court had jurisdiction to hear valuation as part of Section 306 litigation and addressed their comments primarily to Congress' intent in enacting Section 306. No discussion of constitutional issues is reflected in the record or in the opinions of the district court and the court of appeals.

CONCLUSION

Reduced to essentials, the Respondents' argument is that this case is not "ripe" for certiorari. Apparently, Respondents do not dispute that this case presents an issue of overriding national importance which must ultimately be resolved by this Court.

By imposing a requirement of intent where none exists under the statute, the Tenth Circuit has significantly altered the character of Section 306 and impaired its effectiveness as a tool for eliminating state tax discrimination against railroads. Resolution of the issue of whether an intent requirement may be engrafted on the plain language of Section 306 will not only permit the final adjudication of this case on its merits, but will also permit the proper adjudication of similar Section 306 cases pending in other jurisdictions. Thus, judicial economy and prudent judicial administration will be served by the grant of certiorari in this case; nothing will be served by postponing the resolution of this issue to a later date. The railroads respectfully submit that the court of appeals, and the district court, have erred in their interpretation of Section 306(1)(a) and that a petition for certiorari should issue to clarify the meaning of this important federal statute. Additionally, the railroads submit that, in view of this Court's recent decision in *Aloha Airlines*, the error of the court of appeals and the district court is so plain that this is a proper case for summary disposition on

the merits in favor of the railroads pursuant to Rule 23 of the rules of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

C. MICHAEL LENNEN, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in a case alleging that a state has overvalued railroad property for ad valorem tax purposes, the prohibition against discriminatory state taxation of railroads in Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. V) 11503, is limited to purposeful overvaluation with discriminatory intent.

TABLE OF CONTENTS

	Page
Statement	1
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Alabama Great Southern R.R. v. *Eagerton*, 633 F.2d 1036 5

Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 ..... 13, 15

Atchison, T. & S.F. Ry. v. *Lennen*, 552 F. Supp. 1031, aff'd in part and rev'd in part, Nos. 82-1873, 82-1878, 82-1891 (10th Cir. Apr. 27, 1984) 3, 4, 5, 6

Clinchfield R.R. v. *Lynch*, 527 F. Supp. 784, 700 F.2d 126 ..... 4, 5, 16

Ogilvie v. *State Board of Equalization*, 657 F.2d 204, cert. denied, 454 U.S. 1086 5

Personnel Administrator v. *Feeney*, 442 U.S. 256 .. 15

Southern Ry. v. *State Board of Equalization*, 715 F.2d 522, cert. denied, No. 83-886 (Mar. 19, 1984) 5, 16

Weinberger v. *Catholic Action*, 454 U.S. 139 13

Statutes and regulations:

Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. V) 11503 (recodification of Section 306), Pub. L. No. 94-210, 90 Stat. 54:

§ 306, 49 U.S.C. (Supp. V) 11503 ..... *passim*

§ 306(1), 49 U.S.C. (Supp. V) 11503(b) 3, 13, 14

§ 306(1)(c), 49 U.S.C. (Supp. V) 11503(b)(3) 5

§ 306(1)(d), 49 U.S.C. (Supp. V) 11503(b)(4) 13, 14

§ 306(2)(b), 49 U.S.C. (Supp. V) 11503 note .. 15

Statutes and regulations—Continued: Page

§ 306(2)(c), 49 U.S.C. (Supp. V) 11503(c).. 4, 15
§ 306(2)(d), 49 U.S.C. (Supp. V) 11503(c)..4, 10, 16
§ 306(2)(e), 49 U.S.C. (Supp. V) 11503(c).... 4
Tax Injunction Act, 28 U.S.C. 1341 1

Miscellaneous:

H.R. Rep. 94-725, 94th Cong., 1st Sess. (1975)..... 14, 16
S. Rep. 1483, 90th Cong., 2d Sess. (1968)..... 15
S. Rep. 91-630, 91st Cong., 1st Sess. (1969).....2, 3, 4, 11, 14, 15, 16
S. Rep. 94-499, 94th Cong., 1st Sess. (1975)..... 2

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, recodified at 49 U.S.C. (Supp. V) 11503, prohibits discrimination by states in the taxation of rail transportation property. Section 306 also confers jurisdiction on federal district courts, without regard to the amount in controversy or the citizenship of the parties, to enjoin violations of its provisions notwithstanding the Tax Injunction Act, 28 U.S.C. 1341.

In passing the 4R Act, Congress recognized the "depressed * * * financial performance" of railroads

and the "decline" in their fiscal condition. S. Rep. 94-499, 94th Cong., 1st Sess. 2 (1975). It noted that "[e]ight major carriers in the Northeast and Midwest are bankrupt; several elsewhere in the country are in precarious financial condition and one is bankrupt" (*id.* at 3). Furthermore, Congress found that "[t]he importance of railroads to our Nation's economy cannot be overemphasized" (*id.* at 4). Accordingly, the 4R Act was designed "to promote the revitalization of the railroad industry in the United States" (*id.* at 1).

Section 306 constitutes an integral part of the 4R Act and represents the culmination of 15 years of congressional consideration of the problem of discriminatory state taxation of railroads. Congress determined that such discrimination "deprive[s] * * * a carrier of revenues needed in the performance of its services in interstate commerce." S. Rep. 91-630, 91st Cong., 1st Sess. 9 (1969).[1] As Congress found (H.R. Rep. 94-725, 94th Cong., 1st Sess. 78 (1975)):

> [R]ailroads are over-taxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve

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[1] Congress explained:

> Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals.

S. Rep. 91-630, *supra*, at 3.

Although Section 306 was finally enacted in 1976, the materials in the extensive legislative history most relevant to the question presented in this case are found in the deliberations of the 91st Congress in 1969-1970.

> our national rail transportation needs, the Committee believes discriminatory property and "in lieu" taxation should be ended.

Section 306 was intended " 'to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district' " and "to eliminate the discriminatory tax practices weakening our national transportation system * * *" (S. Rep. 91-630, *supra*, at 2, 3). In the legislative history "the State of Kansas was repeatedly found by Congress to be one of the states discriminating in the assessment and taxation of railroad property." *Atchison, T. & S.F. Ry.* v. *Lennen*, 552 F. Supp. 1031, 1037 (D. Kan. 1982), aff'd in part and rev'd in part, Nos. 82-1873, 82-1878, 82-1891 (10th Cir. Apr. 27, 1984).

Section 306(1) declares that any action prohibited thereunder "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (Pet. App. 37a). In brief, the statute forbids a state or political subdivision to (*ibid.*):

(a) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property in the assessment jurisdiction bears to the true market value of such commercial and industrial property; in other words, it requires that

$$\frac{\text{assessed value of railroad property}}{\text{true market value of railroad property}} = \frac{\text{assessed value of other property}}{\text{true market value of other property}}$$

(b) levy or collect a tax based on such an assessment

(c) levy or collect an ad valorem property tax on railroad transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the assessment jurisdiction, or

(d) impose any other tax that results in discriminatory treatment of a railroad common carrier.

In addition, Section 306(2)(d) provides that the burden of proof on the issues "of assessed value and true market value" shall be "that declared by applicable State law" (*id.* at 38a). The statute also provides that the ratio of assessed to true market value of commercial and industrial property in the assessment jurisdiction may be established through a sales assessment ratio study (Section 306(2)(e), Pet. App. 38a), which uses the arm's-length sales price to ascertain the true market value for a statistical sample of properties that have been sold; furthermore, if such a study does not establish the necessary ratio for commercial and industrial property to the satisfaction of the court, the court shall use the ratio of assessed to true market value for *all* other property in the jurisdiction (rather than only commercial and industrial property) that is subject to a property tax levy (*ibid.*). See S. Rep. 91-630, *supra*, at 26-27; *Clinchfield R.R.* v. *Lynch*, 700 F.2d 126, 129 & n.4, 133 n.11 (4th Cir. 1983); *Atchison, T. & S.F. Ry.* v. *Lennen*, 552 F. Supp. at 1040, 1047-1048. Finally, a court may not grant relief under Section 306 unless the ratio of assessed to true market value for railroad property exceeds the comparable ratio for other property by at least five percent (Section 306(2)(c), Pet. App. 38a).

As the court of appeals correctly recognized (Pet. App. 4a), Section 306 prohibits both de jure and de

facto discrimination.[2] De jure discrimination arises if state law taxes railroads at a higher tax rate than is applicable to commercial and industrial property in the state (see Section 306(1)(c), Pet. App. 37a) or assesses railroad property at a different assessment rate than other property. De facto discrimination, on the other hand, occurs where state law, although not specifically establishing different tax or assessment rates, results by its operation in discriminatory treatment of railroad property. See *Atchison, T. & S.F. Ry.* v. *Lennen*, 552 F. Supp. at 1039 & n.10; *Clinchfield R.R.* v. *Lynch*, 527 F. Supp. 784, 785 n.5 (E.D. N.C. 1981). As the court of appeals explained (Pet. App. 4a), "[t]he most common form of de facto discrimination" is to apply the tax rate "to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property"; thus, this type of de facto discrimination involves the undervaluation of non-rail property and was termed by the courts below as the issue of "equalization relief." In addition, de facto discrimination against railroads can exist when their property is assessed "at a value higher than its true market value" (*ibid.*); this claim of overvaluation, which is at issue in the present case, was referred to below as the issue of "valuation relief."

2. a. Petitioner railroads brought this action in the United States District Court for the District of

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[2] See also *Southern Ry.* v. *State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), cert. denied, No. 83-886 (Mar. 19, 1984); *Alabama Great Southern R.R.* v. *Eagerton*, 633 F.2d 1036, 1040 (11th Cir. 1981); *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); *Clinchfield R.R.* v. *Lynch*, 527 F. Supp. 784, 785 (E.D.N.C. 1981).

Kansas to enjoin the collection by respondent Kansas officials of the 1982 ad valorem tax from the railroads.[3] Petitioners raised two issues of de facto discrimination under Section 306.[4] First, they contended that, even accepting the State's determination of true market value for their property, the ratio of assessed value to true market value for railroad property exceeded the ratio for all other commercial and industrial property in Kansas as determined by a sales assessment ratio study.[5] Based on the stipulation of the parties, the district court held that this equalization issue was controlled by the court's prior decision in another case challenging the Kansas tax for the 1980 and 1981 tax years (see Pet. App. 10a n.2, 12a),[6] and it accordingly entered a preliminary injunction in favor of petitioners on their equalization claim. That ruling was not appealed by respondents (see Pet. App. 3a) and is not at issue in this petition.

Second, petitioners argued that respondents had violated Section 306 by valuing their railroad property for ad valorem tax purposes at more than actual "true market value." After holding a three-day hearing, the district court rejected this valuation claim and denied petitioners' request for a preliminary injunction (Pet. App. 13a-27a). The court found that Section 306 was designed to provide equalization re-

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[3] The Kansas tax system is described in *Atchison, T. & S.F. Ry.* v. *Lennen*, 552 F. Supp. at 1035-1036.

[4] Petitioners asserted no claim of de jure discrimination.

[5] This contention also was raised by five other railroads that were plaintiffs in the district court but are not petitioners here (Pet. App. 9a-11a).

[6] See *Atchison, T. & S.F. Ry.* v. *Lennen*, 552 F. Supp. 1031 (D. Kan. 1982), aff'd in part and rev'd in part, Nos. 82-1873, 82-1878, 82-1891 (10th Cir. Apr. 27, 1984).

lief for railroads "from discriminatory taxes through improper assessments or rates" (*id.* at 22a), but that "[d]iscriminatory valuation of the railroads * * * was not the problem that Congress sought to remedy in the passage of Section 306" (*id.* at 21a-22a). In the court's view, "Congress did not intend to place the burden on the federal courts * * * to review and determine the correctness of the valuation procedures and the actual valuation results for the railroads by each state assessing agency. * * * We simply do not believe that Congress intended for the federal courts to become involved in establishing new or better procedures for the states in the valuing of railroads" (*id.* at 21a-22a). Thus, the court concluded that Section 306, rather than requiring a district court to determine the issue of market value, contemplated the use of the valuation established by the state, and therefore "the issue of the appropriate 'true market value' of a railroad is generally not to be an issue in a Section 306 case" (*id.* at 22a).

The district court recognized "an exception to th[is] general rule that Congress did not intend the federal courts to get involved in valuation problems in Section 306 cases" (Pet. App. 24a). It concluded that "a court, under the equity power vested in the federal courts by Congress under Section 306, could examine the valuation established by a state where a railroad has shown that a state overvalued its property in retaliation for past relief accorded under Section 306" (*ibid.*). However, finding respondents' explanations for the valuations "to be credible," the court ruled that petitioners "have failed to adequately demonstrate any retaliation by [respondents] in their 1982 valuations" (*id.* at 27a).

Finally, the district court, in the alternative, rejected petitioners' contention that their property had

been overvalued at all (Pet. App. 27a). The court stated that "even if we were to consider simply the issue of overvaluation, we do not find that [petitioners] demonstrated reasonable cause to believe that [respondents], under the standards provided under Kansas law, overvalued [petitioners'] property in 1982" (*ibid.*). See also *id.* at 32a ("even assuming that the court could consider an ordinary overvaluation case under Section 306, we do not find that [petitioners] have shown that [respondents] overvalued their property under the guidelines established by Kansas law").

b. The court of appeals affirmed the district court's denial of a preliminary injunction on the valuation issue (Pet. App. 1a-7a). Although finding "plausible" (*id.* at 4a) petitioners' contention that a district court in a case alleging overvaluation should determine the true market value of the railroad property, the court believed that that is not "the proper interpretation" of Section 306 (*ibid.*). The court concluded that Section 306 was not "intended to provide relief from every form of de facto discrimination" (*ibid.*) and that "equalization, not valuation, relief was intended to be made available to the railroads" (*id.* at 5a). The court expressed concern that a contrary construction would enable the railroads to

> challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis. Such a rule would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions. Absent a specific direct[ive] from Congress, we are unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property.

Id. at 6a. Accordingly, the court held that "the valuation relief sought by [petitioners] is not provided by § 306" (*id.* at 4a).

The court of appeals acknowledged an exception to this construction that would authorize valuation relief to be granted. It held that a valuation "suit can be maintained whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation" (Pet. App. 6a). Emphasizing that "a strong prima facie case of retaliation or intentional discrimination must be made" (*ibid.*), the court examined the record and the findings of the district court and concluded that petitioners "did not make a sufficient showing of discriminatory overvaluation" (*ibid.*).

ARGUMENT

For the reasons stated below, we submit that the court of appeals erred in holding that a railroad must show purposeful overvaluation with discriminatory intent in order to obtain valuation relief under Section 306. In our view, however, that error of statutory interpretation does not warrant further review in this case. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals held that, in the absence of purposeful overvaluation with discriminatory intent, Section 306 does not prohibit a state's overvaluation of railroad property for ad valorem tax purposes. In effect, by precluding challenges to discriminatory taxation based on overvaluation of railroad property unless improper intent is shown, the court of appeals has treated the state's determination of value to be conclusive on the question of what is the

"true market value" of the property under Section 306. Such a construction is inconsistent with the statute.

On its face Section 306 refers to the "true market value" (Pet. App. 37a) of railroad property and makes that factor an integral element of the statutory test for discriminatory taxation. Nothing in the text or structure of the statute suggests in the least that, contrary to usual litigation procedures, a district court would be barred from determining all controverted issues of fact material to the controlling legal standard and instead must accept as true the state's determination of value even though it is contested by the railroad. Thus, we believe the normal presumption is that the issue of true market value, like other factual issues, would be open to dispute and proof in litigation under Section 306. Furthermore, this conclusion is confirmed by the language of Section 306(2)(d), which expressly provides that "the burden of proof with respect to the determination of assessed value and *true market value* shall be that declared by applicable State law" (Pet. App. 38a (emphasis added)). By this reference Congress clearly indicated its understanding that the question of value would be subject to litigation in cases under Section 306.

This construction is also supported by the purposes of Section 306. As discussed above (see pages 2-3, *supra*), Congress enacted the statute to end the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert, as the court of appeals did (Pet. App. 4a), that Section 306 was not "intended to provide relief from every form of de facto discrimination." See also cases cited in note 2, *supra*.

The court of appeals' holding would frustrate the purposes of the statute and lead to irrational consequences that Congress could not have intended. As the court of appeals recognized (Pet. App. 4a), Section 306 is clearly applicable to equalization claims of de facto discrimination. Equalization claims arise where a state undervalues commercial and industrial property, so that the ratio between the assessed and true market value of such property is less than the corresponding ratio for rail property. In that situation, Section 306 plainly has been violated. However, precisely the same discriminatory result can be achieved by overvaluing railroad property in relation to its true market value—the very valuation claim raised in this case and rejected as a matter of law by the court of appeals. In both instances the effect of the state tax is to discriminate against railroads. In light of the 15-year effort that led to the enactment of Section 306 and the significant remedial policies served by the legislation, we do not think that Congress could have intended to exclude valuation claims of de facto discrimination and thereby allow states a ready means to evade the statutory strictures.

The legislative history also indicates that Congress did not simply accept and incorporate into Section 306 a state's valuation of rail property as the "true market value" of the property. For example, the Senate Committee on Commerce noted the inadequacies in state valuation practices and observed that railroads " 'are discriminated against as compared to other taxpayers in the same jurisdiction, due in large measure to outdated procedures (which are sometimes deliberately retained) for assessment of property.' " S. Rep. 91-630, 91st Cong., 1st Sess. 2 (1969) (citation omitted); see also *id.* at 18. In

view of such "outdated procedures" Congress surely would not have anticipated that the state's valuation would be conclusively deemed to be the "true market value" of rail property.

Furthermore, in discussing the term "true market value" (see S. Rep. 91-630, *supra*, at 10), the committee explained that "[t]rue market value is the *goal generally sought* by all tax assessors" (*id* at 25 (emphasis added)) and "provides *a single standard* against which all affected assessments must be measured" under the statute (*id.* at 26 (emphasis added)); see also *ibid.* (true market value is "the *generally accepted standard* for assessment purposes") (emphasis added). Thus, Congress understood that "true market value" is an objective economic concept that is generally the aim—although not necessarily the actual result—of state assessments. Once again, this congressional understanding rebuts the suggestion that the value of rail property should not be open to litigation under Section 306 even if the state's valuation does not in fact meet the "goal" of true market value.

Finally, the committee made clear that the statutory "standard * * * [of] 'true market value'" is "not a standard for determining value; *it is a standard to which values that have already been determined must be compared*" (S. Rep. 91-630, *supra*, at 26 (emphasis added)). Thus, while Section 306 does not "require a State to change its assessment standards" (*id.* at 25), the value determined thereunder by the state "must be compared" to the "true market value" standard of Section 306. Accordingly, Section 306 cannot be understood simply to adopt the state's valuation as the "true market value" of rail property and hence to foreclose judicial inquiry into the issue.

Objections to the court of appeals' exclusion of valuation claims from the scope of Section 306 are

not overcome by the court's "intent" exception to its general rule. There is nothing in the language, history, or purpose of Section 306 to suggest that the intent of state officials is the decisive issue or to justify disparate treatment of valuation and equalization claims. On the contrary, Section 306(1) specifically refers, not to intent, but to "action[s]", and makes it unlawful for a state "to commit any of the [enumerated] acts" (Pet. App. 37a); and the residual clause in Section 306(1)(d) is explicit in its prohibition of any "tax *which results in discriminatory treatment*" of a railroad (Pet. App. 37a (emphasis added)). Thus, the court of appeals' "intent" test "is a creature of judicial cloth, not legislative cloth" (*Weinberger* v. *Catholic Action*, 454 U.S. 139, 141 (1981)). Furthermore, questions of intent are often elusive and difficult of proof, and it would defeat Congress's remedial objective to read Section 306 to turn on such matters. Likewise, an "intent" standard would require extensive probing into and judicial scrutiny of the internal deliberations and decisions of state officials, which—quite contrary to the expressed goal of the court of appeals (see Pet. App. 5a-6a)—would both seriously complicate litigation under Section 306 and significantly intrude upon the governmental processes of the states. Cf. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 & n.18 (1977). At least in the absence of a clear legislative policy choice entailing these costs—and, we repeat, there is *no* evidence to that effect in this case—such undesirable consequences should not be attributed to Congress or imposed through judicial inference.

We share the court of appeals' concern that the federal courts not be converted, by virtue of Section 306, into review boards for determining the correctness of

the states' annual assessments of railroad property values. But, rather than the "intent" approach devised by the court of appeals, it is the language, history, and purpose of the statute that should determine the proper role of the federal courts under Section 306. Plainly, *discrimination* against railroads is the focus of the Act. Thus, Section 306, as its title indicates, "prohibit[s] discriminatory tax treatment" of rail property (Pet. App. 37a), and declares unlawful, as "an unreasonable and unjust discrimination against * * * interstate commerce" (Section 306(1), Pet. App. 37a), a number of enumerated taxes as well as "any other tax which results in discriminatory treatment" of railroads (Section 306(1)(d), Pet. App. 37a). Similarly, the legislative history demonstrates that Section 306 "prohibits any state from discriminating between rail property and other similar commercial[] tax[] properties" (H.R. Rep. 94-725, 94th Cong., 1st Sess. 56 (1975); see also *id.* at 76, 77-78), and requires that railroads "receive equal treatment with other taxpayers" (S. Rep. 91-630, *supra*, at 6). "[T]he activity forbidden is unjust discrimination against interstate commerce; that is, against carriers engaged in interstate operations" (*id.* at 9; see also *id.* at 26).

In line with this animating purpose of Section 306 to prohibit discriminatory taxation of railroads, we submit that a valuation claim is cognizable under the statute if it is alleged and proven that the overvaluation constitutes discrimination against the railroad qua railroad. Thus Section 306 would apply to overvaluations that result from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for rail property. On the other hand, if a railroad, like

any other state taxpayer, asserts only that the state made an error in reaching an excessively high value for its property, no relief for that overvaluation claim would be available under Section 306.[7] This construction would allow Section 306 to operate in the case of those overvaluations that threaten the central statutory purpose of eliminating discriminatory taxation of railroads; at the same time it would not turn the federal courts into administrative tax boards to review the correctness of each and every assessment of a railroad's property.[8]

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[7] It will often be the case that, because the analysis of effects and consequences constitutes a principal means of proving intent (see, *e.g.*, *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275, 278-280 (1979); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 256), the outcome under the court of appeals' test and under our proposed standard will be the same. But there is a difference in principle and in litigation practice between an "intent" test (even if it may in a given case be satisfied by proof of results) and a "discrimination" test that makes the results of the state's tax system upon railroads the legal touchstone.

[8] We also note that other provisions in the Act serve to limit the involvement of federal courts in state tax matters. First, the effective date of Section 306 was postponed for three years in order to enable states to correct the discriminatory features of their tax systems. See Section 306(2)(b), Pet. App. 38a; S. Rep. 91-630, *supra*, at 15. In addition, Section 306(2)(c) provides that no relief may be granted unless the ratio of assessed value to true market value for rail property exceeds by at least five percent the corresponding ratio for all other commercial and industrial property in the jurisdiction. See Pet. App. 38a; S. Rep. 91-630, *supra*, at 13, 14-15, 22; S. Rep. 1483, 90th Cong., 2d Sess. 27 (1968) (individual views of Senator Cannon). Thus, minor deficiencies in a state's tax system, even though systematically discriminatory against railroads, are not grounds for relief. Finally, because the

2. Despite our disagreement with the holding of the court of appeals, we believe that further review in this case is not warranted. The question presented is one of statutory construction, and there is no conflict among the circuits on the issue. In these circumstances, the Court's customary standards for certiorari are not met.

Furthermore, this statutory issue is a novel one that has not yet been adequately considered by the courts. To our knowledge, litigation under Section 306 has generally involved either claims of de jure discrimination (see *Clinchfield R.R.* v. *Lynch*, 527 F. Supp. at 785 n.5) or, as petitioners acknowledge (Pet. 14), equalization claims based on the underassessment of commercial and industrial property. We are aware of no case other than the present one—and neither the courts below nor the parties have cited any—in which an overvaluation claim of de facto discrimination has been decided. Cf. *Southern Ry.* v. *State Board of Equalization*, 715 F.2d at 526 (noting but not addressing the issue). Given the variety of interpretations expressed in this case by the two lower courts, the parties, and ourselves, we believe it would be advisable for the issue to receive further consideration and analysis before being addressed by this Court.

Finally, this case does not seem well suited in any event for review of the issue. The district court found that petitioners had not demonstrated that

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burden of proof under Section 306(2)(d) follows state law (Pet. App. 38a), it will generally be the obligation of the railroad to come forward to prove a violation of the statute; if the railroad cannot carry this burden, it will be entitled to no relief. See H.R. Rep. 94-725, 94th Cong., 1st Sess. 77-78 (1975); S. Rep. 91-630, *supra*, at 11-12, 15.

their property was in fact overvalued (Pet. App. 27a), and this alternative ruling provided a sufficient and independent basis for denying a preliminary injunction to petitioners. Although the court of appeals apparently did not reach this alternative ground (*id.* at 6a), it is doubtful that the result in this case would be altered even if petitioners prevailed on the question they have presented. At a minimum, the district court's findings suggest that the record here would not adequately illuminate the issue of overvaluation or inform the Court of the relevant considerations that arise with respect to excessive valuation of railroad property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITIONERS' RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
1. This Case Involves A Decision By A Federal Court Of Appeals On An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court, And Therefore Meets The Standard Of Rule 17.1(c)	3
2. The District Court's "Finding" Does Not Foreclose Review Of This Case	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Aloha Airlines, Inc. v. *Director of Taxation of Hawaii*, 104 S.Ct. 291 (1983) 7

Arizona Public Service Commission v. *Snead*, 441 U.S. 141 (1979) 7

Atchison, Topeka & Santa Fe Ry. v. *Lennen*, Nos. 82-1873, 82-1878, 82-1891 (10th Cir., April 27, 1984) . 6

Burlington Northern R.R. v. *Bair*, No. 83-100-A (S.D.Iowa, April 20, 1984) 6

Burlington Northern R.R. Co. et al v. *Duncan*, No. 83-4204 (D.Kan.) 5

Burlington Northern R.R. Co. v. *Oklahoma Tax Commission*, Nos. 83-419R, 83-2165R (W.D. Okla.) 5

Heublein, Inc. v. *South Carolina Tax Commission*, 409 U.S. 275 (1972) 7

Missouri Pacific R.R. Co., et al v. *Maurer*, Nos. 82-C-1445, 82-C-1536 (D. Colo.) 5

Southern Pacific Transportation Co. v. *State Board of Equalization*, No. C-81-4848 S.W. (N.D. Cal.) ... 6

Southern Pacific Transportation Co. v. *Utah Tax Commission*, Nos. C-82-1037W, C-83-1118W (D. Utah) 5

Southern Railway Co., et al v. *State Board of Equalization*, Nos. C-81-695A (N.D. Ga., August 27, 1981) *rev'd*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3687 (1984) 6

STATUTORY PROVISIONS:

49 U.S.C. § 11503 recodification of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ..... *passim*

MISCELLANEOUS:

S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969) 4, 5

Supreme Court Rule 17.1(c) 3, 4

Supreme Court Rule 23 10

IN THE

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No. 83-802

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

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C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITIONERS' RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The position taken by the United States in its brief, relating to the proper construction of Section 306, strongly supports the position of Petitioners in this case. By way of emphasis, Petitioners note the following points made in the brief of the United States, which are identical to

points asserted by Petitioners throughout the course of this litigation:

(a) On its face Section 306 refers to the "true market value" of railroad property and makes that factor an integral element of the statutory test for discriminatory taxation. (p. 10).

(b) Nothing in the statute suggests in the least that, contrary to usual litigation procedures, a district court would be barred from determining all controverted issues of fact material to the controlling legal standard and instead must accept as true the state's determination of valuation even though it is contested by the railroad. (p. 10).

(c) Congress clearly indicated its understanding that the question of value would be subject to litigation in cases under Section 306 by providing expressly in Section 306(2)(d) that "the burden of proof with respect to the determination of assessed value and *true market value* shall be that declared by applicable state law." (p. 10).

(d) Given the important remedial objective of the legislation, it is implausible to assert, as the court of appeals did, that Section 306 was not "intended to provide relief from every form of de facto discrimination." (p. 10).

(e) Precisely the same discrimination results whether commercial and industrial property is undervalued or railroad property is overvalued. Congress could not have intended to exclude valuation claims of de facto discrimination and thereby allow states a ready means to evade the statutory strictures. (p. 11).

(f) Congress understood that "true market value" is an objective economic concept that is generally the aim—although not necessarily the actual result—of state assessments. This congressional understanding refutes the suggestion

that the value of rail property should not be open to litigation under Section 306. (p. 12).

(g) "True market value" is a standard to which values that have already been determined must be compared. Thus, while Section 306 does not require a state to change its assessment standards, the value determined thereunder by the state must be compared to the true market value standard of Section 306. (p. 12).

(h) The court of appeals erred in holding that the "intent" of state officials is the decisive factor under Section 306. On the contrary, Section 306 refers not to intent but to "actions" and makes unlawful the mere commission of any of the enumerated acts. (p. 13).

(i) "[A] valuation claim is cognizable under the statute if it is alleged and proven that the overvaluation constitutes discrimination against the railroad." (p. 14).

Despite this accurate analysis of Section 306 and its purpose, the United States comes to the incongruous conclusion that further review of the case is not warranted. It offers two grounds which it suggests support this conclusion: (1) this Court's customary standards for certiorari are not met; and (2) the district court found that Petitioners had not demonstrated that their property was in fact overvalued. Petitioners disagree with the United States on both points.

ARGUMENT

1. This Case Involves A Decision By A Federal Court Of Appeals On An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court, And Therefore Meets The Standard Of Rule 17.1(c).

Petitioners have stated in their petition (pp. 13-17) the reasons why this important question should be settled by

this Court now. Simply stated, the decision below would thwart the intent of Congress in enacting Section 306, since it would open the door to widespread discrimination through overvaluation of railroad property, subject only to an ill-defined and nebulous "intent" test which has no support in the statute. Precisely the same point is made by the United States in its brief. (p. 11) Despite the clear danger thus threatened,[1] the United States recommends against review by this Court because "[t]he question presented is one of statutory construction, and there is no conflict among the circuits on the issue." (p. 16)

Rule 17.1(c) does not require a conflict among the circuits. The rule requires only that the court below "has decided an important question of federal law which has not been, but should be, settled by this Court."

Congress has determined that discriminatory taxation of rail transportation property by states is a problem of national concern. Remedial legislation was considered vital since the Senate Committee on Commerce found that in the nine years preceding 1969, railroads had been assessed more than nine hundred million dollars in discriminatory taxes and that these taxes increased transportation costs to the consumer:

> Ultimately, the shipper and consumer pay the bill for discriminatory taxation. Not only are such taxes reflected in the transportation costs of goods purchased by the consumer, but also the consumers of

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[1] Kansas, New Mexico, Oklahoma, Utah and Wyoming, five of the six states in the Tenth Circuit, are among those states singled out by Congress as having the highest degree of discrimination against railroads at the time anti-discriminatory tax legislation was being considered. S. Rep. No. 91-630, 91st Cong., 2d Sess. 5 (1966). The Senate Report indicates that those five states alone, in 1968, imposed more than $12,000,000 in discriminatory taxes on railroads.

> the States which do not discriminate are forced to share the costs of these burdensome tolls.

S. Rep. No. 91-630, 91st Cong., 1st Sess. 3 (1969).

The Committee concluded that these discriminatory tax practices were weakening the national transportation system and burdening the Nation's consumers and, therefore, must be eliminated. Accordingly, Congress determined to put an end to discriminatory state taxation of railroads by enacting Section 306.

The effect of a denial of certiorari in this case will be that the Tenth Circuit's erroneous interpretation of Section 306 will be allowed to stand and discrimination will not be eliminated in the Tenth Circuit, at least, until an actual conflict in the circuits occurs and another case can be brought before this Court.[2] Meanwhile, the Tenth Circuit's decision could exert an improper influence in other circuits on the implementation of this important aspect of national transportation policy.[3]

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[2] Presently, in addition to Kansas, litigation is pending in Colorado, Utah, and Oklahoma in which specific claims of discrimination resulting from overvaluation have been raised. *Burlington Northern R.R. Co., et al.*, v. *Duncan*, No. 83-4202 (D. Kans.); *Missouri Pacific R.R. Co., et al.*, v. *Maurer*, Nos. 82-C-1445, 83-C-1536 (D. Colo.); *Southern Pacific Transportation Co.* v. *Utah Tax Commission*, Nos. C-82-1037W, C-83-1118W (D. Utah); *Burlington Northern R.R. Co.* v. *Oklahoma Tax Commission*, Nos. 83-419R, 83-2165R (W.D. Okla.). Those states will be able to continue to impose discriminatory taxes upon railroads, burdening interstate commerce and requiring shippers and consumers in other states to pay for this discrimination, unless the railroads are able to show that the discrimination was intentional, the requirement erroneously enunciated by the Tenth Circuit.

[3] In addition to cases in the Tenth Circuit, litigation is pending in California, Georgia, and Iowa involving claims of discriminatory overvaluation of rail transportation property under Section 306.

Furthermore, the development of a conflict which could result in another case being presented to this Court is difficult to envisage. If another circuit should decline to follow the "intent" rule of the Tenth Circuit, and should grant relief to a railroad litigant, there is no assurance that the state would seek review by this Court. On the other hand, if, subsequently, yet another circuit should agree with the Tenth Circuit, that court would dismiss the complaint and dissolve the injunction (if one had ever been granted) for failure to prove intent, leaving the railroad no recourse but to pay the disputed taxes. Recent cases, however, have held that Section 306 grants prospective relief only and does not permit refund of taxes once they have been paid. *Burlington Northern R.R.* v. *Bair*, No. 83-100-A (S.D. Iowa, April 20, 1984) (reprinted in Appendix A); *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, Nos. 82-1873, 82-1878, 82-1891 (10th Cir., April 27, 1984), *reversing* 531 F.Supp. 220 (D. Kan. 1980) (reprinted in Appendix B). Thus, once the taxes had been paid the case would become moot since no remedy could be afforded. Accordingly, the railroad would be without any way to seek review of the issue by this Court.

In this case Petitioners have been successful in keeping an injunction in place in order to protect their rights on appeal. The Tenth Circuit, in fact, stayed the issuance of its mandate, thereby continuing the injunction, in order to preserve Petitioner's right to petition this Court for certiorari. If certiorari is denied in this case it may not be possible in another case to keep an injunction in force long enough to secure review by this Court.

Southern Pacific Transportation Co. v. *State Board of Equalization*, No. C-81-4848 S.W. (N.D. Cal.); *Southern Railway Co., et al.*, v. *State Board of Equalization*, No. C-81-695A (N.D. Ga.); *Burlington Northern Railroad Co.* v. *Bair*, No. 83-100A (S.D. Iowa).

In other cases which involved federal statutes limiting state taxation of interstate commerce, this Court has consistently exercised jurisdiction to insure proper interpretation of those statutes, *e.g.*, *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 104 S.Ct. 291 (1983); *Arizona Public Service Commission* v. *Snead*, 441 U.S. 141 (1979); *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972). Those cases came before this Court on appeal rather than by petition for certiorari; nevertheless, they signify that this Court ascribes importance to a proper interpretation of federal statutes regulating state taxation of interstate commerce. An erroneous interpretation of Section 306, affecting not just a single state but many states, should not be permitted to stand simply because access to this Court is by way of certiorari rather than appeal.

The issue to be decided is now squarely before this Court, and no purpose will be served by waiting to a later time to correct the Tenth Circuit's erroneous interpretation of Section 306.

2. The District Court's "Finding" Does Not Foreclose Review Of This Case.

The United States suggests that this case "does not seem well suited" for review of the issue, because "[t]he district court found that petitioners had not demonstrated that their property was in fact overvalued." Petitioners submit that the quoted statement does not accurately describe the holding of the district court. In its order the district court stated: ". . . we do not find that the railroads have shown that the defendants overvalued their property *under the guidelines established by Kansas law.*" (Pet. App. 32a). [Emphasis added]. In its supplemental opinion, the district court stated: ". . . we do not find that the plaintiffs demonstrated reasonable cause

to believe that the defendants, *under standards provided under Kansas law*, overvalued the plaintiffs' property in 1982." (Pet. App. 27a). [Emphasis Added].

These gratuitous "findings" can only be taken to mean that the Kansas taxing authorities had followed Kansas procedures and guidelines in a manner that appeared to be routine and not irregular. The district court made no finding that the state's suggested figure was the railroad's true market value; instead, it found only that the property of the railroads was not overvalued according to "guidelines established" or "standards provided" under *Kansas* law. But as the United States recognizes, and as Petitioners have consistently maintained, the law of Kansas (or of any particular state) is not the standard to be used in comparing assessments under Section 306. Section 306 establishes an objective standard (true market value) to which assessments of rail transportation property must be compared. The United States correctly points this out in its brief:

> Congress understood that "true market value" is an *objective economic concept* that is generally the aim—although not necessarily the actual result—of state assessments. (p. 12). [Emphasis added].

Thus, the federal court must objectively determine the "true market value" of rail transportation property without regard to state "guidelines" and "standards" in order to make the comparison required under Section 306.

On this point, the court of appeals merely determined that the railroads had not met the intent requirement it had enunciated. The United States acknowledges at page 17 of its Brief that the Tenth Circuit never reached the question of the true market value of the railroads.

CONCLUSION

This case presents a question of national importance, involving the proper interpretation of a federal statute designed to implement national transportation policy. This question should be decided by this Court now, so that this national policy may be developed in a consistent manner on a nationwide basis and that discrimination contrary to this policy will not be permitted to exist. It is important, also, that this Court decide the case now, in order to define and protect the interests of litigants in other cases involving the same issue both in the Tenth and in other circuits. If the decision of the Tenth Circuit is incorrect, as both the Petitioners and the United States assert, this Court should decide the case now, rather than awaiting a conflict, so that national transportation policy will not be frustrated.

This case involves a real and substantial controversy between the parties, the outcome of which depends upon the resolution of the issue before this Court. The "findings" of the district court do not foreclose review, since they were made upon an erroneous interpretation of Section 306. The case should be remanded so that proper findings, after hearing, may be made in accordance with the objective standard of true market value required by Section 306.

For all the above reasons, the writ should be granted. Additionally, the railroads submit that, in view of the Brief of the United States confirming that the decision of

the Tenth Circuit is erroneous, this is a proper case for summary disposition on the merits in favor of the railroads pursuant to Rule 23 of the rules of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIV NO. 83-100-A

THE BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

GERALD D. BAIR, Director of the
Department of Revenue of Iowa,
Defendant.

FILED

DES MOINES, IOWA

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

RULING AND ORDER ON PERSONAL PROPERTY TAXATION ISSUE

Plaintiff filed this action alleging that the State of Iowa's personal property tax system discriminated against plaintiff in two ways, thus violating Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210 § 306, 90 Stat. 31, 54-55, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News. 180-81 [hereinafter "Section 306"].[1] Plaintiff

[1] Section 306 is currently codified, with minor amendments, at 49 U.S.C. § 11503. The minor amendments included in the codified

contends: (1) that in tax years 1979, 1980, 1981, and 1982, the State of Iowa assessed and collected or sought to collect tax payments on plaintiff's personal property while effectively allowing nearly all other personal property owners to exempt their commercial and industrial personalty from *ad valorem* taxation; (2) that in tax years 1981 and 1382, the State of Iowa assessed all of plaintiff's property in Iowa at a level well-above its true market value; and (3) that for tax years 1981 and 1982, the State of Iowa assessed all commercial and industrial property locally-assessed in Iowa at a level that is much lower than the level at which plaintiff's property was assessed.

On April 4, 1983, the court preliminarily enjoined defendant from collecting more than fifty percent of the *ad valorem* tax payments assessed against plaintiff for the second half of tax year 1981. The parties agreed to a similar injunctive order for subsequent taxes.

The third contention ((3), *supra*) was severed from the first two contentions. The trial on the first two issues was held from December 12 to December 16, 1983. The Court ordered posttrial briefing, which was completed March 5, 1984.

Although the first issue is not complicated, the second issue involves complex tax-assessment and tax-accounting questions. In the interest of allowing the parties to know of the Court's determinations as soon as possible, the Court has decided that it should issue its

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version are not to be construed as making a substantive change to Section 306. Revised Interstate Commerce Act of 1978, Pub. L. 95-473, 92 Stat 1337, 1466, 95th Cong. 2d Sess., *codified at* 49 U.S.C. Subtitle IV. The parties have stipulated that the language of Section 306 shall govern in circumstances in which there is a conflict between Section 306 and 49 U.S.C. § 11503. Pretrial Stipulation, paragraph 2.

ruling on the first issue and, subsequently, issue a separate ruling on the second issue. Initially, the Court must address a contention raised by defendant before trial by motion to dismiss.

I. Defendant's Motion to Dismiss Plaintiff's Request for Tax Payment Refunds.

Plaintiff paid its property taxes to the State of Iowa for tax years 1979 and 1980 without protest. The first half of tax year 1981 was paid before filing this action under protest. Plaintiff now requests the Court to order defendant to refund that portion of its 1979, 1980, and first-half 1981 property tax payments which is allocable to personal property. The Court finds that it is not within the Court's power to order refunds of any taxes paid to the State before the filing of a Section 306 action.

A. The language of Section 306 does not provide for tax payment refunds.

Section 306(2) provides that United States district courts have jurisdiction to grant mandatory or prohibitive injunctive relief as is necessary to prevent, restrain, or terminate acts in violation of Section 306(1). The acts proscribed by Section 306(1) are the assessment, levy, or collection of a discriminatory property tax, or the imposition of any other type of discriminatory tax. Plaintiff argues that a reasonable interpretation of the word "terminate" should result in a determination that United States district courts are vested with authority to order refunds of taxes paid before the filing of a federal action.

The Court finds that the language of sections 306(1) and 306(2), when read *in pari materia* and in light of 28 U.S.C. § 1341, evince an intent on Congress's part to allow the United States district courts to halt any state acts that would result in the state attaining payments

through the implementation of a tax system that discriminates against transportation property owners. The language is, therefore, intended to provide for relief from acts that are imminent or are likely to recur, and not retrospective relief. Atchison, Topeka, & Santa Fe Ry. v. Lennen, 531 F. Supp. 220, 237 (D. Kan. 1981).

B. Principles of comity mandate a narrow construction of the relief provision of Section 306.

The United States Supreme Court has recently reenunciated the long-standing doctrine that federal courts exercise extraordinary restraint in adjudicating actions that would affect state tax affairs. Equitable restraint in state tax matters is "particularly appropriate because of the delicate balance between federal authority and state governments, and the concomitant respect that should be accorded to state tax laws in federal courts." Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 107-09 (1981). Congress was clear in excepting Section 306 from the broad ban of the Tax Injunction Act, 28 U.S.C. § 1341. Section 306(2). However, in light of the equitable restraint doctrine, the Court concludes that the exception of section 306(2) must be given a narrow construction. Any ambiguity in the word "terminate," therefore, will not be interpreted as an indication that federal district courts may open state coffers to plaintiff railroads seeking refunds of past tax payments. Only prospective relief should be allowed.

C. The Eleventh Amendment bars retrospective relief recovery.

The Eleventh Amendment[2] mandates that a federal court cannot assert jurisdiction over a suit by a private

[2] The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

party seeking to impose a liability that must be paid from public funds in the state treasury. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Congress may in certain circumstances abrogate states' Eleventh Amendment immunity from suit in federal court by enacting legislation pursuant to the Commerce Clause. Parden v. Terminal Ry., 377 U.S. 184, 190-98 (1964). Congressional abrogation, however, is not to be inferred; it must be clear from the language of the law enacted. Employees of the Dept. of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 283-87 (1973); *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976); Parden, *supra* at 187-90; Tribe, Intergovernmental Immunities in Litigation, Taxation, & Regulation: Separation of Powers Issues in Congroversies about Federalism, 89 Harv. L. Rev. 682, 691 (1976). Section 306 does not clearly vest federal district courts with the authority to force states to refund tax payments once made. Thus, the Court concludes that it would be in violation of the Eleventh Amendment were it to order the State of Iowa to make the refund of tax payments requested by plaintiff.

In summary, the most reasonable interpretation of Section 306 does not permit the Court to direct defendant to refund the taxes plaintiff paid before filing this action. Furthermore, the Court is barred by the Eleventh Amendment from ordering defendant to make the refund. Accordingly defendant's motion to dismiss will be granted. Plaintiff's request for refund of any portion of its taxes paid before filing this action will be denied.

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against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

II. The Personal Property Taxation Issue.

Plaintiff's contention that the State of Iowa assessed and sought to collect tax payments on plaintiff's personal property while allowing nearly all other personal property owners to exempt their personalty from taxation, in the second half of tax year 1981 and in tax year 1982, is now ready for ruling. This court has jurisdiction over the personal property taxation issue under section 306; 28 U.S.C. § 1337, as the issue arises from an act of Congress regulating interstate commerce; and 28 U.S.C. § 1331.

A. Section 306.

The Eighty-sixth Congress requested a national transportation policy study. A preliminary draft was presented to the Eighty-seventh Congress in 1961. One of the conclusions drawn from the study was that property taxation in many states had, for many years, operated in a fashion inherently discriminatory against the railroads. Fifteen years later in 1976, Congress passed Section 306.[3]

Section 306 prohibits states from committing any of the following acts:

> "(a) The assessment . . . , for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

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[3] For a more complete review of the history see Clinchfield R.R. v. Lynch, 700 F. 2d 126, 128 n.1, (4th Cir. 1983), and Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 206-07 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Section 306(1). The purpose of Section 306 is to remedy discriminatory taxation against railroads. Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 207 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Section 306 is directed toward both state real and personal property, and remedies under Section 306 should be tailored to eliminate discrimination in both categories. Clinchfield R.R. v. Lynch, 700 F. 2d 126, 129 (4th Cir. 1983).

B. The Relevant Portion of Iowa's Tax System.

In Iowa, as in most states, railroads' operating property is valued for property tax purposes as a unit. Under the unit concept of value, the fair market value of railroad operating property is measured by appraising the whole property as a going concern because it derives its true value not from the sum of its parts, but from the integrated use of the parts to carry traffic, render public service and, from the investors standpoint, generate income. The various states in which a particular railroad operates have various statutory formulas under which a portion of the value of the unit is allocated to that state. Under the Code of Iowa all real and tangible personal property subject to taxation in Iowa, including rail transportation property, is to be valued at its "actual value" and shall be assessed at 100% of its actual value. Actual

value is defined as the fair and reasonable market value or the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. The parties have stipulated that "actual value" as used in Iowa Code § 434.15, and "true market value," as used in Section 306, are synonomous. Pretrial Stipulation, paragraph 9.

In 1973 Iowa embarked on a program to reduce and eventually eliminate taxation of personal property for all but a few commercial and industrial personal property owners. Under Iowa Code § 427A.11, local tax assessors reduce the assessed value of each taxpayer's personal property so that the total assessed value of all personal property in the assessing jurisdiction does not exceed the total actual value of personal property in that jurisdiction as of January 1, 1973, excluding livestock. This statutory scheme will be referred to as the "rollback" provision.

Section 427A.2, Code of Iowa, allows a credit, not to exceed $10,000, against the rolled-back, assessed value of tangible personal property owned by persons and business enterprises. In addition, under Iowa Code § 427A.9, each locally-assessed personal property taxpayer is granted an additional personal property tax credit which increases in relation to the growth of state general fund revenues. The general fund revenues are intended to replace, at least in part, the revenues in the local jurisdiction that have been lost as a result of the decreased personal property tax. Both the Section 427A.2 and 427A.9 tax "credits" are more properly termed tax "exemptions" because they serve to reduce the valuation figure to which the tax rate is applied. They are not credits against the tax.

The Iowa personal property tax plan calls for an increase in the statutory exemption in nine phases. After the ninth phase is implemented, all state tax on personal property *taxed as personal property* will have been eliminated. The personal property tax plan is currently in its fourth phase.

Certain property that would commonly be characterized as "personal property" is statutorily designated to be "real property" under the Iowa tax system. Iowa Code § 427A.1. Thus, as stipulated by the parties, all tangible commercial and industrial personalty owners are benefitted by the rollback and exemption provisions, except those owners of personalty excluded by Iowa Code § 427A.1. The types of personalty excluded from the benefits of the rollback and exemption provisions are: (1) all property commonly characterized as personalty owned by public service companies that are centrally assessed by the Department of Revenue (including railroads); (2) machinery used in manufacturing; (3) computers; and (4) transmission towers and antennae. Thus, it will be necessary to classify personalty affected by the rollback and exemption provisions as "exempt personal property," and personalty excluded by Section 427A.1 as "non-exempt."

The benefits from which owners of non-exempt personal property are excluded are significant. The rollback provision has resulted in an assessed value of exempt personal property that is considerably less than its true market value. As a result of the rollback provision, the assessed value of exempt personal property was reduced by 63% in tax year 1981 and by 67% in tax year 1982. The exemption provisions, taken cummulatively, have served to further reduce the tax valuation figure for owners of exempt personal property by an additional $175,000 for tax years 1981 and 1982.

C. Segregation of plaintiff's personal property.

The primary issue in this action is whether the Court may consider plaintiff's evidence tending to show that over one-half of the value of plaintiff's property, allocated to Iowa, represents value of property of a type commonly characterized as personal property. The parties have stipulated to the portion of plaintiff's unit value that is properly allocated to Iowa. Defendant, however, argues that plaintiff's property, as allocated to Iowa under the unit value concept, must be considered by the Court to be inseparable. Thus, defendant contends that all plaintiff's property can be compared only in the aggregate to all other commercial and industrial property, both real and personal. Accordingly, defendant presented no evidence of what portion of plaintiff's property allocated to Iowa is of a type commonly characterized as personalty.

Plaintiff presented evidence to show that, for tax years 1981 and 1982, between fifty-one and fifty-four percent of plaintiff's property allocable to Iowa is of a type commonly characterized as personalty. This evidence was derived by two expert witnesses called by plaintiff. Mr. Steven L. Wood submitted an affidavit and testified on the basis of an analysis of plaintiff's annual reports to the Interstate Commerce Commission [hereinafter "I.C.C."]. By segregating the book values (in the accounts in each I.C.C. report) that were representative of the value of property commonly characterized as either "personal" or "real," Mr. Wood testified that in tax years 1981 and 1982, the portion of plaintiff's Iowa property that was personalty was 53.80% and 53.12%, respectively.

Dr. Arthur A. Schoenwald testified at trial on the basis of a mode of segregating railroad personal and real property that he had done in Minnesota. Dr. Schoenwald also testified that his analysis was of a type commonly used in

North Dakota and Illinois to segregate railroad personalty from realty. Based on the book values of the various accounts in the I.C.C. annual reports, Dr. Schoenwald determined the portion of plaintiff's unit value allocable to Iowa that is commonly characterized as personal property. The results of Dr. Schoenwald's calculations were that in tax years 1981 and 1982, the portion of plaintiff's unit value allocable to Iowa that was personalty was 54% and 53%, respectively.

The Court finds that the analysis of Mr. Wood and Dr. Schoenwald are valid and reliable methods of determining approximately the portion of plaintiff's unit value allocable to Iowa that represents property of a type that is commonly classified as personal property, the results of Dr. Schoenwald's calculations were subject to fluctuation, depending on the type of depreciation method used or the values given certain types of property. However, the depreciation-method used by Dr. Schoenwald is that commonly used in calculating real-personal property splits, and the values given were not shown to be unreasonable under current circumstances and accepted tax-accounting standards. Although there is no clear relationship between book value and actual value, the difficulty of precisely determining the actual value of real and personal property valued as a unit, should not be a barrier to the implementation of Section 306. Thus, the Court will accept the personal property "breakout" method and calculations by plaintiff, without significant amendment.

The issue remains whether it is appropriate under Section 306 to distinguish personal from real property. Defendant cites no legal authority to support his contention that plaintiff's property is inseparable. Plaintiff relies on caselaw from the courts of appeal for the Eighth and Fourth Circuits to support its contention that drawing the distinction is proper in circumstances in which a party

proves the distinction with valid and reliable evidence. Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 454 (D. N.D. 1980) (citing legislative history distinguishing personal and real property), *aff'd*, 657 F. 2d 208 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Clinchfield R.R. v. Lynch, 700 F. 2d 126, 133-34 (4th Cir. 1983) (indicating that personal and real property should be distinguished).

The purpose of Section 306 could be thwarted were federal courts to accept the argument that defendant raises. The facts in this case provide an appropriate example. The obvious discrimination resulting from Iowa's rollback and exemption statutes could not be remedied.[4] Furthermore, the discrimination, albeit blatant, may not rise to the five-percent limit set by Section 306(2)(c) in all circumstances. In circumstances in which transportation property taxation discrimination is designed as part of the statutory tax system itself, federal courts have held that the five-percent limit should not be construed to vitiate the clear intent of Congress in enacting Section 306. Trailer Train Co. v. State Bd. of Equalization, 697 F. 2d 860, 866 (9th Cir. 1983); Burlington Northern R.R.

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[4] The Court realizes that some classification systems may have such minor discriminatory impact on transportation property owners that they would not violate Section 306. The Iowa personal property tax plan, however, affecting such a large portion of property in Iowa and designed to exempt select types of personalty from taxation, is not of that sort.

In addition, the Court does not imply that transportation property should be compared to types of property that are traditionally tax-exempt, such as property owned by churches and charitable institutions, and homesteads. Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Again, however, the facts do not present that sort of comparison.

v. Department of Revenue, 570 F. Supp. 585, 595 (W.D. Wis. 1983).

Because there is precedent supporting the segregation of real from personal transportation property in Section 306 analysis, and policy reasons for doing so in circumstances in which de jure[5] discrimination is alleged, the Court concludes that plaintiff's "breakout" of its transportation property that is commonly characterized as personalty must be accepted in this action. The Court concludes that plaintiff has shown that fifty-percent of its transportation property in Iowa is properly characterized as personal property, and would be so characterized were it not for Iowa Code § 427A.1(h).

D. Classifying the claim: do the facts present a de facto tax discrimination claim or an "any other [discriminatory] tax" claim.

Defendant contends that the facts in this action require the Court to analyze plaintiff's claim as a de facto discrimination claim, governed by sections 306(1)(a), 306(2)(c), and 306(3)(c). This contention is based primarily on defendant's attempt to distinguish Ogilvie v. State Bd. of Equalization, 492 F. Supp. 456 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981). According to defendant, *Ogilvie* is distinguishable

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[5] "De jure" discrimination occurs in circumstances in which transportation property is required by statute to be assessed or taxed at a rate different from other commercial and industrial property. In contrast, "de facto" discrimination occurs in circumstances in which, though the taxation system is not designed to cause differing assessment or taxation rates, the operation of the system results in such disparity. Burlington Northern R.R. v. Lennen, 715 F. 2d 494, 497 (7th Cir. 1983); Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 785 (E.D. N.C. 1981), *aff'd*, 700 F. 2d 126 (4th Cir. 1983). Both forms of discrimination are proscribed by Section 306.

on the ground that, under the North Dakota tax system challenged in *Ogilvie*, the assessment ratio of Section 306(1)(a) was not affected by the inclusion of railroad personalty and the exclusion of all commercial and industrial personalty. In this action, the challenged tax scheme does not directly affect the transportation personal property assessment percentage but does affect the commercial and industrial personalty assessment percentage, thus affecting the assessment ratio. Notwithstanding the plausibility of defendant's proposed distinction of *Ogilvie*, however, the Court is convinced that the rationale underlying the Section 306(1)(d) analysis in *Ogilvie* opinion applies with full force in this action.

In *Ogilvie* the United States Court of Appeals for the Eighth Circuit could have carried out the de facto discrimination analysis called for by defendant. Certain centrally-assessed commercial and industrial personalty was taxed in North Dakota; only locally-assessed commercial and industrial personalty was exempt. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Thus, assessment percentages for both personal and transportation property and personal commercal and industrial property (including centrally and locally assessed types) could have been calculated. The Court of Appeals, however, determined that such an analysis was inappropriate. In circumstances similar to those presented here, the Court of Appeals decided that discriminatory taxation, implemented through selective classification of property, presented a case of *de jure* discrimination proscribed by Section 306(1)(d). Ogilvie v. State Bd. of Equalization, 657 F. 2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Court will follow the well-reasoned analysis of the Court of Appeals in *Ogilvie*.

The most significant effect of accepting defendant's argument that this is a *de facto* discrimination claim would be that the very large statutory personal property tax exemptions would be irrelevant to the analysis. This is because, as pointed out by plaintiff, the statutory exemptions would be excluded from the analysis under the last clause of Section 306(3)(c).[6] In this action, plaintiff has shown with valid and reliable evidence that the statutory $175,000-per-year exemption (in conjunction with the rollback) has the effect of reducing to approximately five percent the portion of personal property owners who have to pay any tax on their personal property. The court accepts plaintiff's proof and, additionally, finds that the statutory exemption is the most significant factor resulting in such a small percentage of Iowa personal property owners paying a tax on their personal property. It would be illogical to make irrelevant the statutory exemption which has the most discriminatory effect on the taxation of plaintiff's transportation property. Congress could not have intended such a result in enacting Section 306(3)(c).

Another effect of treating this is a *de facto* discrimination claim would be that non-exempt personal property, other than transportation property, would significantly affect the ratio calculation. The Court finds that defendant has shown that approximately one-half the value of all personal property in Iowa is excluded from the tax benefits of the rollback and exemptions by the classification system provided for in Iowa Code § 427A.1. The fact that a number of personal property owners other than railroads are discriminated against in the same manner as

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[6] The last clause of Section 306(3)(c) excludes all commercial and industrial property not subject to a property tax levy from the term, "commercial and industrial property," as used in sections 306(1)(a)-(c).

plaintiff should not affect plaintiff's claim for relief under Section 306. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Thus, the Court concludes that it would not be in keeping with Section 306 to aggregate all commercial and industrial personal property because doing so would serve to skew the analysis and reduce the calculated quantity of tax discrimination against plaintiff that is actually occurring under the Iowa personal property tax plan.

In summary, the Court concludes, for the reason stated above, that plaintiff's claim is properly to be treated as an "any other [discriminatory] tax" claim, governed by Section 306(1)(d) and the rationale of *Ogilvie*.

E. Section 306(1)(d) Analysis.

Plaintiff contends that all its personal property should be exempted from taxation under a proper mode of analysis. According to plaintiff, it must be treated as the median taxpayer who owns exempt personal property and who, in turn, benefits from the Iowa personal property tax plan. Plaintiff has shown that well over fifty-percent of such taxpayers do not pay any tax on their personal property taxed as personal property because of the $175,000 exemption. Therefore, plaintiff asks the Court to order that it not pay any tax on its approximately $30 million worth of property properly classified as personalty.

The Court finds no reason to craft such a crude form of relief in circumstances in which relief can be tailored to remedy the specific discrimination shown to exist. In addition, there is no case law showing that the "median approach" is appropriate in Section 306(d)(1) cases. Rather, precedent indicated that the relief should eliminate only the type of tax discrimination proved to exist,

without considering a fictional median taxpayer. *See, e.g.*, Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd*, 657 F. 2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Alabama Great Southern R.R. v. Eagerton, 541 F. Supp. 1084, 1087 (M.D. Ala. 1982); *see also* Atchison, Topeka, & Sante Fe Ry. v. Bair, 535 F. Supp. 68, 69-71 (N.D. Iowa 1982). Accordingly, the Court will grant relief in form intended to eliminate the specific type of tax discrimination proven by plaintiff in this portion of this civil action.

IT IS THEREFORE ORDERED that defendant's motion to dismiss plaintiff's request for tax-payment refunds for tax years 1979 and 1980, and the first half of tax year 1981, shall be and hereby is granted.

IT IS FURTHER ORDERED that, pursuant to sections 306(1)(d) and 306(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, defendant is enjoined from excluding fifty percent of plaintiff's unit value, which is properly characterized as personal property, allocable to Iowa, from the tax benefits derived from the rollback and exemption provisions of Iowa Code §§ 427A.11, .2, and .9, for the second half of tax year 1981 and tax year 1982.

Signed this 20th day of April, 1984.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

APPENDIX B
PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-1873, 82-1878, 82-1891

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, *et al.*,

Defendants-Appellants,

UNION PACIFIC RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, *et al.*,

Defendants-Appellants,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, et al.

Defendants-Appellants,

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Plaintiffs-Appellees,

v.

MICHAEL LENNEN, et al.

Defendants-Appellants,

BURLINGTON NORTHERN, INC., *et al.*,
Plaintiffs-Appellees,

v.

PHILIP W. MARTIN, *et al.*,
Defendants-Appellants.

FILED

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

APRIL 27 1984

HOWARD K. PHILLIPS
Clerk

Appeal from the United States District Court
For the District of Kansas
(D.C. Nos. 80-1690, 80-4172, 80-4173, 80-4176, 80-4181)

Carol B. Bonebrake, Attorney, Department of Revenue, Topeka, Kansas, (James J. McGannon of Regan & McGannon, Wichita, Kansas, with her on the brief) for the state Defendants-Appellants/Cross-Appellees.

Robert J. O'Connor (Jeff A. Roth, also of Hershberger, Patterson, Jones & Rogh, Wichita, Kansas; Donald J. Horttor and Grant M. Glenn of Cosgrove, Webb & Oman, Topeka, Kansas; and Paul M. Buchanan, Assistant County Counselor, Wichita, Kansas, with him on the brief) for the county Defendants-Appellants/Cross-Appellees.

Robert C. Foulston (Jay F. Fowler with him on the brief) of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, for Plaintiffs-Appellees/Cross-Appellants.

Before MCKAY, LOGAN, AND SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from an order enjoining defendants Kansas Secretary of revenue Michael Lennen, Director of Property Valuation of the Kansas Department of Revenue Philip Martin, and the Kansas Department of Revenue ("state defendants") from assessing the plaintiff railroads' property at more than 12.4% of true market value as the basis for 1980 property taxes. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 552 F. Supp. 1031 (D. Kan. 1982). A number of Kansas county treasurers ("county defendants") intervened as defendants in this case, and they also appeal. Plaintiffs cross-appeal from an order dismissing their claims for restitution of alleged overpayment of property taxes for 1979.

All defendants contend on appeal that the district court erred (1) by allowing plaintiffs to prove the assessment ratio for "all other commercial and industrial property" by means of a study based on real property only; (2) by not giving proper weight to the assessment ratio for state-assessed property other than railroad property in determining the assessment ratio for "all other commercial and industrial property"; and (3) by admitting the official Kansas sales assessment ratio study into evidence. The county defendants argue that the district court should have ordered the Wichita railroads to pay 18% interest on their delinquent 1980 taxes. On cross-appeal plaintiffs argue that the district court erred in ruling that the railroads could not receive restitution for overpayment of 1979 taxes.

The Statute

In 1976 Congress enacted legislation prohibiting states from discriminating against rail transportation property in the assessment, levying, and collection of property taxes. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54.[1] Section 306 was first codified at 49 U.S.C. § 26c. The language of § 306 was changed and recodified at 49 U.S.C. § 11503 as part of the Revised Interstate Commerce Act of 1978, 49 U.S.C. §§ 10101-11917. Because the revision was not intended to change the law, we must resolve any substantive conflicts between the original language of § 306 and the language in § 11503 in favor of the original language. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 257-58 (10th Cir. 1981). Because this appeal involves difficult questions of statutory construction, the original language of § 306 is important. That section provided:

> "Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:
>
> 'Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or

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[1] The 94th Congress produced little legislative history concerning § 306. The bulk of the relevant legislative history comes from two earlier bills that were similar to § 306, S. 927, 90th Cong., 1st Sess., 113 Cong. Rec. 2887 (1967) and S. 2289, 91st Cong., 1st Sess. 115 Cong. Rec. 14332 (1969). *See Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983).

subdivision to commit any of the following prohibited acts:

'(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

'(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

'(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

'(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

'(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

'(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

'(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

'(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment juridsiction;

'(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

'(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction which is included in such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

'(3) As used in this seciton, the term—

'(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

'(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

'(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

'(d) "transportation property" means transportation property, as defined in regulations of the Commission which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.'."

Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, § 306, 90 Stat. 31, 54-55.

Kansas Property Taxation

Kansas law requires that all property subject to a property tax be assessed at 30% of its fair market value. Kan. Stat. Ann. § 79-1439. Each year the Kansas director of property valuation appraises railroads and other public utilities on a unit basis. The director determines the total value of a particular public utility, including both real and personal property, and then determines the portion of that value that is to be assigned to Kansas and the portion

of the Kansas value that is to be assigned to each county. County appraisers, rather than state appraisers, determine the value of other property in Kansas subject to property taxation. They appraise personal property each year, but they appraise real property less frequently because Kansas law prohibits countywide reappraisal of real property as the basis for levying taxes until the director of property valuation certifies reappraisal. Kan. Stat. Ann. § 79-1451. The last reappraisal of real property took place during the period from 1963 to 1971. The combined effect of infrequent reappraisal and inflation is that the ratio of assessed value of county-assessed real property is its true market value is almost always below 30 percent.

In 1980, the commercial and industrial property base in Kansas, excluding railroads, 60% was locally-assessed personal property, 15% was locally-assessed real property, and 25% was state assessed.

The Proceedings Below

In June 1980 the Atchison, Topeka and Santa Fe Railway Company sued the state defendants under 49 U.S.C. § 11503, alleging that Kansas was discriminating against railroad property in the assessment and collection of property taxes.[2] The same day the Union Pacific Railroad Company and the St. Joseph and Grand Island Railway Company filed a similar complaint against the state defendants. Subsequently, two other railroads, the Chicago, Rock Island and Pacific Railroad Company and the Missouri-Kansas-Texas Railroad Company, each filed similar suits. We will refer to the plaintiffs in those four

[2] For a more detailed description of the early proceedings in this case, see *Atchison, Topeka and Santa Fe Ry. v. Lennen*, 531 F. Supp. 220 (D. Kan. 1981).

suits as "the Topeka railroads." In September 1980 seven other railroads[3] ("the Wichita railroads") filed a similar suit. In addition to their claim based on 1980 taxes, the Wichita railroads sought restitution of alleged overpayment of property taxes for 1979.

In November 1980 the district court denied the Topeka railroads' request for a preliminary injunction to restrain the State of Kansas from collecting the disputed taxes assessed against the Topeka railroads for the first half of 1980, which were due on December 20, 1980. The Topeka railroads took an emergency appeal to this Court, and this Court granted a temporary injunction pending the resolution of the appeal. Thereafter, the district court granted the Wichita railroads' request for a preliminary injunction pending the resolution of the Topeka railroads' appeal. The district court found that the entire amount levied against the Wichita railroads for the first half of 1980 was in dispute because the Wichita railroads sought to offset their alleged overpayments of 1979 taxes against their 1980 payments. Therefore, the district court allowed the Wichita railroads to pay the entire amount levied against them into the registry of the court, pursuant to Fed. R. Civ. P. 67.

Shortly thereafter this Court held that the district court should have granted the Topeka railroads' request for an injunction. *Atchison, Topeka and Santa Fe Rail-*

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[3] The Wichita railroads are: the Burlington Northern, Inc.; the Chicago and Northwestern Transportation Co.; the Kansas City Southern Railway Co.; the Kansas and Missouri Railway and Terminal Co.; the Kansas City Terminal Railway Co.; the Missouri Pacific Railroad Co.; and the St. Louis-San Francisco Railway Co. On March 4, 1981, the parties stipulated that the Burlington Northern, Inc. should be substituted as the successor in interest to the St. Louis-San Francisco Railway Co.

way v. Lennen, 640 F.2d 255 (10th Cir. 1981). Therefore, the preliminary injunctions remained in effect. The district court allowed the Topeka railroads to deposit the disputed taxes, 58% of the amounts levied against them, into the registry of the court.

The Topeka railroads then filed amended complaints, which added claims based on taxes they had paid in 1979, and all the railroads amended their complaints to name various county officials as defendants. Subsequently, all the cases were consolidated for further proceedings. After hearings the district court dismissed the Topeka and Wichita railroads' claims based on 1979 property taxes, and because the county defendants were named only in regard to the claims based on 1979 taxes, the district court dismissed the county defendants from the suit. The county defendants later reappeared as parties when the district court granted their motion to intervene. Thereafter, the district court ordered the clerk to distribute to the appropriate counties 40% of the Wichita railroads' deposit with the registry, which was the amount no longer in dispute, together with 40% of the interest that had accrued on the deposit.

At the trial, which took place in February 1982, the district court found for plaintiffs and enjoined defendants from assessing against or collecting from plaintiffs 1980 property taxes based on an assessment higher than 12.2% of true market value. 552 F. Supp. 1031. Subsequently, the district court amended the judgment to prohibit assessment at a level higher than 12.4%.

I

Defendants argue that the railroads failed to meet their burden of proof under § 306 because they did not offer evidence of the ratio of the assessed value of commercial

and industrial *personal property* to its true market value. To evaluate that argument we must first determine what a plaintiff must show to establish a case under § 306.

Section 306(2)(d) provides: "[T]he burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." Under Kansas law the "burden of proving a disputed fact or issue rests upon the party asserting it as a basis of his claim." *Bowen v. Hathaway*, 202 Kan. 107, 446 P.2d 723, 272 (1968).[4]

Section 306(1)(a) prohibits

> "[t]he assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purpose of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property."

Section 306(2)(c) provides for relief when the assessment ratio for railroad property exceeds the assessment ratio for other commercial and industrial property by 5%.

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[4] The district court held that plaintiffs had to prove their case by clear and convincing evidence. The court cited *Northern Natural Gas Co. v. Williams*, 208 Kan. 407, 493 P.2d 568 (1972), in support of that holding. It is not clear to us why the district court held that the standard was clear and convincing evidence. Preponderence of the evidence is the usual standard under Kansas law. *See In re Wright's Estate*, 170 Kan. 600, 228 P.2d 911, 914 (1951).

A plaintiff may easily determine the true market value of its railroad property[5] and its assessed value, which presumably will be 30% of its true market value. Its real burden is to prove the true market and assessed values of "all other commercial and industrial property." A plaintiff must then show that the ratio of assessed value to true market value of the railroad property is at least 5% greater than the ratio of assessed value to true market value for "all other commercial and industrial property."

The issue here is whether plaintiffs presented sufficient evidence to prove the ratio of the assessed value to true market value for "all other commercial and industrial property." Section 306(3)(c) defines "all other commercial and industrial property" as "all property, real or *personal*, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." (Emphasis added.) To meet their burden of proof plaintiffs introduced the Kansas Real Estate Assessment/Sales Ratio Study for 1980, which was conducted pursuant to Kan. Stat. Ann. §§ 79-1435 to 1436b. The Kansas study examines the relationship between the assessed value and the sales price of *real property*. Plaintiffs also produced expert testimony interpreting the Kansas study. Dr. Frederick Ekeblad, one of the plaintiffs' expert witnesses, testified that the study showed that commercial and industrial real property in Kansas

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[5] In *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), we held that Congress did not intend by enacting § 306 for the federal courts to become involved in challenges to the true market valuation figures arrived at by state officials for railroad properties unless the railroad could make a strong showing of purposeful overvaluation with discriminatory intent.

was assessed at 12.1% of its true market value. Plaintiffs offered no evidence of the assessment ratio for personal property in Kansas. Defendants introduced evidence showing that the assessment ratio for personal property was higher than the assessment ratio for real property and was probably close to 30% of true market value.[6]

The district court held that an assessment ratio derived from a study of real estate was prima facie proof of the assessment ratio for "all other commercial and industrial property" and therefore ruled that plaintiffs had established a prima facie case unser § 306(1)(a). The district court adopted the reasoning of the district court in *Clinchfield Railroad v. Lynch*, 527 F. Supp. 784, 787 (E.D.N.C. 1981), *aff'd on other grounds*, 700 F.2d 126 (4th Cir. 1983), which interpreted § 306(2)(e) as an expression of congressional intent that the assessment ratio derived from a sales assessment ratio study of real estate should represent the assessment ratio for all other commercial and industrial property. Section 306(2)(e) provides:

> "[I]n the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property

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[6] Dr. Allison Manson, a professor of statistics at North Carolina State University, testified that he had conducted a sales assessment ratio study on personal property in Saline County, Kansas, and had determined that the median assessment ratio for commercial and industrial personal property was 26.83% of true market value. Also, eleven county appraisers testified and described the methods they used to assess personal property. Each county appraiser testified that he thought personal property in his county was appraised at 28 to 30% of true market value. The district court noted that defendants had introduced evidence "tending to show" that the assessment ratio for personal property "approached" 30%.

> cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in cntravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district."

Plaintiffs point out that § 306(2)(e) expresses a preference for the sales assessment ratio studies as a means of establishing discrimination. They argue that Congress was aware that a sales assessment ratio study is a study of real property and that Congress intended such real estate studies to be representative of the assessment ratio for "all other commercial and industrial property." Congress did so, plaintiffs argue, because of the difficulty of conducting sales assessment ratio studies of personal property.

We disagree. Although we recognize that § 306 is not a model of precision or clarity, we do not think Congress' inclusion of personal property in the definition of "all other commercial and industrial property" was purposeless or inadvertent. In a hearing on an earlier version of § 306, Senator Hansen of Wyoming questioned Philip Lanier, a railroad vice-president, about the fact that the proposed bill would permit a comparison of real property on one hand and real and personal property on the other.

State Tax Discrimination Against Interstate Carrier Property: Hearing on s. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st sess. 43-45 (1969) (testimony of Philip Lanier, vice-president of the Louisville & Nashville Railroad Co.). Senator Hansen later introduced an amendment to S. 2289 that specifically included personal property in the definition of the type of property to which railroad property was to be compared. The Senate adopted the amendment. Cong. Rec. S2023 (daily ed. Jan. 30, 1970). All the successor bills to S. 2289 specifically included personal property in that definition. Plaintiffs' construction of § 306(2)(e) ignores Senator Hansen's amendment.

Although the legislative history shows that Congress knew that sales assessment ratio studies were normally conducted on real property only, plaintiffs cite nothing in the legislative history that suggests Congress assumed that sales assessment ratio studies could not be performed on personal property. In fact, Dr. Rolf Weil, an expert in public finance and an expert witness for plaintiffs at trial, told a senate subcommittee that sales assessment ratio studies could be conducted for personal property:

> "It is by this technique that we can determine the level of assessments in a community. Normally State administrators as well as private industry, when they make such a study, limit the study to real estate. The reason for that is that it is a little more difficult to conduct such a study for personal property. It can be done for certain types of personal property, and invariably it would bring the ratio way down below the level you find by an analysis of real estate only."

State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on

Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 63 (1969) (statement of Rolf Weil, President, Roosevelt University). Although Dr. Weil's statement undermines plaintiffs' theory that Congress thought that sales assessment ratio studies could be conducted on real property only, his statement suggests an explanation of Congress' preference for a method of proof that is generally used for studies of real property despite the statute's inclusion of personal property in "all other commercial and industrial property." Congress may have assumed that Dr. Weil was correct in saying that the inclusion of personal property in a sales assessment ratio study would "invariably" lower the overall assessment ratio and also that Mr. Lanier was correct in telling a Senate committee that it was "universally true" that the assessment ratio for personal property would be lower than the assessent ratio for real property. State Tax Distrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 43-45 (1969) (testimony of Philip Lanier, vice-president of the Louisville & Nashville Railroad Co.). If Dr. Weil's contention were correct, then a plaintiff railroad would only hurt itself if it would not undertake the possibly arduous task of conducting a sales assessment ratio study for personal property. The Fourth Circuit drew the same conclusion in *Clinchfield:*

> "There might be some merit in the district court's position insofar as Congress may have taken for granted that the railroads invariably suffer worse treatment with regard to their personal property than they do with respect to their realty. Where that is the case, the extension of the ratio found for real property to personal property as well works no injustice, at least to the taxing authority."

Clinchfield Railroad v. Lynch, 700 F.2d at 133 n.11.

The evidence in this case clearly demonstrates that in Kansas the assessment ratio for personal property would not lower the overall assessment ratio. We do not think Congress intended railroads to enjoy a windfall in such a situation. We hold, therefore, that, on the facts in this case, the district court erred in allowing plaintiffs to prove the assessment ratio for all other commercial and industrial property by means of a study based on real estate only.[7]

Plaintiffs argue that if they cannot prove their case with a sales assessment ratio study of real estate, § 306(2)(e) requires a comparison of railroad property with all property that is subject to a property tax. They base that contention on their assertion that it is impossible to conduct a sales assessment ratio study of personal property. The assessment ratio for "all property," plaintiffs assert, would be as low as the assessment ratio for real property and defendants would gain nothing by prevailing on this issue. In response, we first note that plaintiffs have not shown that they cannot establish the assessment ratio for personal property by means of a sales assessment ratio study. Indeed, defendants' evidence suggested that such a study, although expensive, would be possible.[8] Also, although the legislative history

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[7] We do not determine whether § 306 creates a presumption that the assessment ratio for personal property is lower than the assessment ratio for real property. Even if such a presumption exists, defendants produced enough evidence to overcome it. *See supra* note 6.

[8] We doubt that such a study would be very costly in Kansas. Local appraisers assess personal property every year. They are required to use valuations in manuals provided to them by the state listing most standard items. Many valuations in the manuals—particularly vehicle valuations—are derived from national sales studies. Thus, for

does not reveal the purpose of § 306(2)(e),[9] we are certain that Congress did not intend to require defendants to forfeit the advantage of having residential, agricultural, and timber-producing real estate excluded from the assessment ratio if plaintiffs were required to prove the assessment ratio for personal property. Because Congress may not have contemplated a situation in which personal property assessment ratios were higher than real property assessment ratios, requiring plaintiffs to prove what those ratios are, Congress may never have considered the difficulty of conducting a sales assessment ratio study on personal property. Therefore, if the plaintiffs demonstrate on remand that preparing personal property sales assessment ratio studies would be prohibitively expensive, the trial court may permit plaintiffs and defendants to provide evidence on the level of assessment for personal property for less onerous forms of proof, such as appraisal studies and expert testimony.

The Fourth Circuit also concluded that § 306(2)(e) permits various types of proof to show the assessment ratio for personal property:

> "To the extent that the opinion of the district judge suggests that reliance should, under § 306(2)(e), be placed solely upon percentages derived from sales-assessment ratio studies of real estate to the ex-

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most personal property items the valuations in all counties will be the same, the figures are readily available from the state manuals, and many valuations may be easily compared with existing national sales studies such as the N.A.D.A. Official Used Car Guide.

[9] A possible explanation for § 306(2)(e) is that it discourages state governments from making real estate sales data inaccessible. If states make such data unavailable, then plaintiffs would have to prove the assessment ratio for all property subject to a property tax. This would eliminate the advantage states have by virtue of the

> clusion of a similar inquiry into personal property by way of appraisal studies and expert testimony, we do not approve what the district judge had to say. The statute makes clear that personal property, as well as real estate, is to be dealt with in the course of achieving equality and thereby eliminating discrimination. We affirm the result reached in the district court on the quite different ground that the proof of the state failed as to the necessary data relevant to personal property."

Clinchfield Railroad v. *Lynch*, 700 F.2d at 133 (footnotes omitted).[10]

II

Although neither party disputes the 30% assessment ratio for state-assessed non-railroad public utility property, defendants object to the method the district court used to factor that assessment ratio into the overall assessment ratio. The district court adopted Dr. Ekeblad's suggestion that the relevant assessment ratio would be the assessment ratio of the median parcel. Although Dr. Ekeblad testified that state-assessed property should not be considered at all, he suggested that the proper way to include such property would be to line up the 87,074 parcels of locally-assessed commercial and industrial real

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exclusion of agricultural and timber-producing property from the definition of "all other commercial and industrial property," and from the exclusion of residential real estate, which is often assessed at ratios comparable to agricultural real property.

[10] The court in *Clinchfield* held that the defendants had the burden of proving the assessment ratio for personal property. The holding was based on the burden of proof under North Carolina law. In North Carolina a showing of an "inequitable difference" rebuts the assumption that an appraisal is correct. The court found that the sales assessment ratio study of real estate that the plaintiffs introduced showed an "inequitable difference." 700 F.2d at 131-32.

estate and the 239 "parcels" of public utility property, find the middle "parcel," and use the assessment ratio for that parcel as the proper assessment ratio for transportation property. Under this method the inclusion of non-railroad public utility property in the assessment ratio for "all other commercial and industrial property" changed the overall assessment ratio only from 12.1% to 12.2%, even thought this property constituted 25% of Kansas' valuation base in 1980 for commercial and industrial property.

Defendants argue that the court should have used a "value weighted mean" to factor the assessment ratio for public utility property into the overall assessment ratio for "all other commercial and industrial property." That method would require the court first to figure the total assessed value of locally-assessed commercial and industrial real property, locally-assessed commercial and industrial personal property, and state-assessed public utility property; then to figure the total true market value of those three kinds of property; and finally to determine the ratio of the total assessed value to the total true market value.

We agree with defendants. A median has no significance if the items on the continuum are not alike in some relevant way. *See* International Association of Assessing Officers Assessment Standards Committee, Standard on Assessment Ratio Studies, § 2.10.3 (1980). "Parcel" as plaintiffs use it in this case is not a unit of measurement. In plaintiffs' calculations a small farm and an entire utility each are one "parcel." The median "parcel" seems an even more inappropriate measure in a case such as this where all "parcels" of personal property would also have to be included in the assessment ratio for "all other commercial and industrial property." When, as here, categories of

property that are subject to different methods of appraisal must be factored together to produce the assessment ratio for "all other commercial and industrial property," each category should be factored in in proportion to its share of the total true market value of all such property. *Cf. AFC Industries, Inc.* v. *Arizona*, 714 F.2d 93, 95 (9th Cir. 1983).

III

Defendants' third argument is that the district court erred by admitting the Kansas Assessment/Sales Ratio Study into evidence. Kansas law prohibits the introduction of the study "in actions involving the assessment of property, sales of which are not required to be reported by county assessors to the director of property valuation under the provisions of K.S.A. 79-1436." Kan. Stat. Ann. § 79-1437b. Defendants also assert that the Kansas sales assessment ratio study is hearsay. However, Kansas evidentiary rules are not applicable in this case. Congress expressed a preference for the sales assessment ratio study as a means of proof, knowing that such a study contains hearsay. Also, the study meets the requirements of the residual exception to the hearsay rule: The statement if offered as evidence of a material fact; the statement is more probative on the point for which it is offered than any other evidence the proponent can produce through reasonable efforts; and the general purposes of the rules of evidence and the interests of justice will be served by admission of the statement. Fed. R. Evid. 803(24).

Defendants also argue that the Kansas study is unreliable. We do not think that the district court erred in finding that the Kansas study was reliable proof of the assessment ratio for real estate.

Taking a final stab at the Kansas study, defendants argue that it was inadmissible because it was not a random sample. The Kansas study included all sales of real estate in Kansas. A random sample of data is helpful only because it accurately depicts the universe of relevant data. The statutory requirement of a random sample is obviously intended to prohibit a selectively skewed sample, not to prohibit a comprehensive study.

IV

The county defendants argue that the district court erred by not ordering the Wichita railroads to pay interest on their delinquent 1980 taxes at the Kansas statutory rate of 18%. *See* Kan. Stat. Ann. § 79-2968. On December 16, 1980, the district court temporarily enjoined defendants from collecting any portion of the property taxes that had been levied against the Wichita railroads for the first half of 1980 and enjoined the county treasurers from penalizing the Wichita railroads for their failure to pay any of the taxes deposited with the court. The court found that all of those taxes were in dispute because the Wichita railroads claimed an offset against their 1980 taxes because of overpayment of their 1979 taxes. On December 20, 1980, the day Kansas property taxes for the first half of 1980 became due, the Wichita railroads deposited the entire $2,504,318.67 with the court pursuant to Fed. R. Civ. P. 67. The district court later dismissed the railroads' claims for restitution of overpayment of 1979 taxes. Because 60% of the 1980 assessment was still in dispute, the clerk distributed to the counties 40% of the Wichita railroads' deposit plus 40% of the interest that had accrued on that deposit.

The counties argue that they are entitled to the difference between the interest they received and the interest they would have received at the 18% statutory rate. They

also contend that the Wichita railroads' delinquent payment of their taxes for the first half of 1980 accelerated the due date for payment of their taxes for the second half of 1980. Because the Wichita railroads paid the counties 40% of the taxes assessed for the second half of 1980 close to the regular due date in June 1981, rather than in December 1980, the counties argue that those railroads owe 18% interest on the taxes for the second half of 1980.

In *Atchison, Topeka and Santa Fe Railway* v. *Lennen*, 640 F.2d 255, 261 (10th Cir. 1981), we held that a court considering whether an injunction should be granted under § 11503(c) must determine whether there is reasonable cause to believe that a violation of § 11503(b) has occurred or is about to occur. After our decision the preliminary injunction granted the Wichita railroads continued in effect. Defendants did not challenge the district court's implicit determination that reasonable cause existed to support continuation of that injunction.

The Wichita railroads did not ultimately prevail before the district court on their claim for restitution of taxes paid in 1979. However, the district court still had the power under § 306 to enjoin collection of the disputed taxes. To allow states to penalize taxpayers for delinquent payment of taxes, when the court has enjoined such payment, would frustrate the purposes of § 306. "[A]ny state law that frustrates or conflicts with the lawful objective of a federal statute must yield to the federal authority." *United States* v. *Composite State Board of Medical Examiners*, 656 F.2d 131, 135 n.4 (5th Cir. 1981); *see, e.g., Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). The district court properly dismissed the counties' claims for interest.

V

In their cross-appeal plaintiff railroads argue that the district court improperly dismissed their claim for partial refunds of taxes paid in 1979. The district court concluded that the plain language of § 306 expressly limits relief to prospective relief. Section 306(2) provides:

> "the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary *to prevent, restrain or terminate* any acts of violation of this section."

(Emphasis added.)

Although the district court's interpretation of that language is sensible, we think several Supreme Court decisions require us to inquire further before determining what forms of relief are available under § 306. *See Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *see also ICC* v. *B & T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980). In *Porter* the Supreme Court held that restitution of rent was available under the Emergency Price Control Act of 1942 even though the Act expressly authorized only "a permanent or temporary injunction, restraining order or other order." The provision in the Emergency Price Control Act for any "other order" might be considered an important distinction between that act and section 306 were it not for the Supreme Court's decision in *Mitchell* v. *DeMario Jewelry, Inc.* In *DeMario* the Supreme Court held that restitution of lost wages was available under the Fair Labor Standards Act even though the express grant of jurisdiction in the FLSA was "to *restrain* violations of section 15." (Emphasis added.) To

support its holding the Supreme Court cited the following language from *Porter:*

> "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> "Moreover, the comprehensiveness of this equitable jurisdiction is not be be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

361 U.S. at 291 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)). The *DeMario* Court concluded:

> "When Congress entrusts to any equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature. Clark v. Smith, 13 Pet. 195, 203.' "

361 U.S. at 291-92.

Because the Supreme Court would not infer a restriction on courts' power to grant restitution from Congress' grant of power under the FLSA to "restrain violations," we are unwilling to infer such a restriction from the language of § 302(2). Rather, as *DeMario* directs, we must determine whether restitution is necessary to effectuate the policy of § 306.

Congress enacted § 306 to help railroads escape discriminatory state property taxation. To allow states time to make corrections, Congress made § 306 effective on February 5, 1979, three years after its enactment. Those three years also gave the railroads time to marshall their forces and to prepare for litigation under § 306. Plaintiffs paid their 1979 Kansas property taxes without protest and did not file suit under § 306 until 1980. Nothing in plaintiffs' brief explains why they did not file suit until 1980.[11] No doubt the local taxing authorities promptly spent the money collected from railroads, pursuant to budgeting decisions already made. Plaintiffs present no equitable basis for their claims for restitution.

We hold that the district court correctly held that restitution was not necessary to further the policy of § 306. Thus, the dismissal of plaintiffs' claims based on 1979 taxes was proper.

AFFIRMED IN PART; REVERSED IN PART.

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[11] We do not determine whether § 306 applied to 1979 Kansas property taxes. *See Alabama Great Southern R.R. v. Eagerton*, 474 F. Supp. 60 (D. Ala. 1979).